Supreme Court, U.S.
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01 856 NOV 29
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No. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 2001**

BEVERLY B. MANN,

*Petitioner,*

v.

DOROTHY BROWN, AS CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, AND COOK COUNTY, ILLINOIS,

*Respondents.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

84 pp

# QUESTIONS PRESENTED

## Introductory Statement

Petitioner, a nonpracticing attorney, filed this lawsuit on her own behalf in federal district court. The complaint was filed as a petition for preliminary injunction and for writ of mandamus and prohibition challenging the constitutionality of a subsection of the Illinois Clerks of Courts Act, 705 ILCS § 105/27.2a(k)(4), that requires the payment of $.25 per page for each page over 200 for the county court clerk to prepare a court record for appeal. (The subsection immediately preceding it, § 105/27.2a(k)(3), requires a threshold payment of $150 for the preparation of the first 200 pages.) The per-page fee is ceilingless and can total several thousand dollars. Under Illinois Supreme Court Rule 321, the entire court record must be prepared and transferred to the appellate court unless a court order is obtained permitting the severance of the relevant portion of the record from the remainder of it. The fee is paid to and (as per Illinois statute) is used exclusively by the county, although under Illinois law the county pays no part of the funding for the trial or appellate courts; it is the state that pays theses expenses. Mann was challenging the fee because as the primary appellant in cross-appeals in a pharmaceutical products liability lawsuit, she was required to pay more than $1,600.00 for the preparation of the court after her motion pursuant to Illinois Supreme Court Rule 321 for severance of the relevant portions of the record was denied.

Mann initially had moved to have the state-court judge who presided in the products-liability lawsuit hear her challenge to the constitutionality of the fee, but that judge declined, in an order that read in material part:

> The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.

Mann had then filed a petition with the Illinois Supreme Court under that Court's Rule 381, which "pursuant to Article VI, Section 4(a), of the Constitution" confers upon that Court original jurisdiction to hear "issues of law" "in cases relating to revenue".

She filed her federal petition after the Illinois Supreme Court denied her Rule 381 petition. The federal district judge denied her petition for preliminary injunction and Mann appealed form that denial. While that appeal was pending, the district court granted the defendants' Rule 12(b)(6) motion to dismiss the complaint, and Mann appealed from the dismissal.

In an unpublished order resolving the appeals, the federal circuit court vacated the Rule 12(b)(6) judgment and remanded the case with instruction to dismiss the lawsuit for lack of subject matter jurisdiction. In that order it also, sua sponte, directed Petitioner to show cause within 14 days why she should not be required pursuant to 28 U.S.C. § 1927 to pay personally Respondents' costs and attorneys' fees for the litigation in both the district and appeals courts. The court also directed Respondents to file with the court an estimated bill of costs and market-value hourly fees for their in-house counsel (assistant state's attorneys), returnable concurrent with Petitioner's response to the Rule to Show Cause. (App. C.)

The order acknowledges that Respondents had asserted none of the several supposed affirmative defenses upon which the court resolved the appeal, and in her response to the order Petitioner challenged each of the defenses as even existing at all.

A few days after petitioner filed her response and Respondents filed their bill of estimated expenses, the court ordered Petitioner to pay to Respondents' counsel within 14 days $5,180, the full amount stated in the estimated bill of expenses, and to file a proof of payment with the court. When Petitioner failed to comply, the court issued an order barring her (or anyone on her behalf) from ever again filing any documents in any federal court within the circuit unless she

first pays the sanction. The order permits her after two years to request vacatur of, or amendment to, the order.

**Questions**

1. Is a federal appeals court entitled sua sponte, whether under 28 U.S.C. §1927 or any other statute or rule, codified or not, to declare a litigant or an attorney guilty of sanctionable conduct without first according her Fifth Amendment procedural due process consisting of notice of the charge and an opportunity to address it, at least in writing if not in an actual hearing?

2. Does a federal appeals court have jurisdiction to issue a sua sponte sanction, whether under 28 U.S.C. §1927 or any other statute or rule, codified or not, against a litigant or an attorney for alleged misconduct that occurred in the district (as opposed to the appeals) court and, even if it has such jurisdiction, does the absence of district-court adjudication of the purported grounds for the sanction constitute a denial of Fifth Amendment procedural due process?

3. Does a federal appeals court have jurisdiction to issue a sanction, sua sponte or otherwise, based in stated part upon alleged misconduct by Petitioner in a state-court proceeding tangentially related to the case on appeal in federal court and, even if it has such jurisdiction, does the absence of adjudication in state court (and in this instance, in any federal court either) of the purported grounds for the sanction constitute a denial of Fifth Amendment procedural due process?

4. Is the "unreasonably and vexatiously" language in 28 U.S.C. §1927 susceptible of interpretation as a

fee-shifting statute essentially indistinguishable from the so-called British "loser pays" rule, by which an attorney must pay her opponents' market-value attorneys' fees for the entire litigation because the appeals court that heard the appeal applied novel interpretations of various laws (and manufactured some rules of law out of thin air) in resolving the litigation? If so, is the language of that statute impermissibly vague or broad under the Fifth Amendment's due process clause and does its novel invocation by the appeals court to Petitioner violate the Firth Amendment's equal protection component?

5. May a federal appeals court impose a sua sponte civil-contempt penalty for failure to comply with its sanction order without first according the Fifth Amendment due process normally required before imposing a penalty for civil contempt?

6. Does the Fifth Amendment's due process clause permit a federal court to issue a civil contempt penalty against an attorney, for failure to pay a 28 U.S.C. §1927 sanction, that bars her from filing (or having someone do so for her) any documents on her *own* behalf as a litigant (as opposed to as an attorney on behalf of someone else) in any federal court within the circuit – given that §1927 authorizes a sanction only against attorneys for conduct in representing a client rather than for any non-attorney-related conduct?

7. Does an appeals court have Article III jurisdiction to completely abrogate the adversarial process in a civil lawsuit by asserting defenses or claims on behalf of a litigant who had not asserted them, and by then resolving the entire lawsuit on the basis of those sua sponte defenses or claims without first

apprising the opposing party of them and according that party an opportunity to address them before the appeal is resolved? And even if Article III jurisdiction exists, does such appellate court action breach Fifth Amendment due process and its equal protection component, the latter because it has denied the losing party the due process accorded parties whose opponents (as opposed to a court, sua sponte) asserted the defenses or claims? And if not, does such appellate court's sua sponte assertion of affirmative defenses violate Fed. R. Civ. P. 8(c)?

8. Must a federal court, by virtue of 28 U.S.C. § 1738 or any other rule of state/federal comity, accord the same preclusive (or non-preclusive) effect to a state-court order that that state's laws accord the order? If so, does the doctrine stated in *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, nonetheless preclude litigation under 28 U.S.C. § 1983 because a state-court order was entered declining to allow joinder of the substantive issue as part of an already pending lawsuit even though under that state's law that order has no preclusive effect regarding the merits of the substantive issue and in fact (under that state's law) is a nonappealable order? And if *Pennzoil* precludes the refiling of the matter notwithstanding the denial of joinder *and* the nonappealability of the order denying joinder, does that violate due process or equal protection guarantees?

9. Does there exist, as the appeals court in this case said, a rule of constitutional law requiring the exhaustion in state court of available state constitutional claims before a 28 U.S.C. § 1983 lawsuit can be brought in federal district court

challenging the constitutionality of a state or local government law or policy?

10. Does the filing of a petition with the state's highest court in accord with state law that confers upon that court original jurisdiction to consider matters of law concerning state revenue provisions satisfy the prerequisites to federal review provided in the Tax Injunction Act, 28 U.S.C. § 1341, or in any other rule of law regarding state/federal comity?

11. Does a graduated, ceilingless state appellate-record-preparation fee of $.25 per page, in this instance a subsection of the Illinois Clerks of Courts Act, 705 ILCS § 105/27.2a(k)(4), coupled with a rule requiring the transfer of the entire trial-court record to the appellate court for appellate review, violate the Fourteenth Amendment's due process when that fee amounts to $1,600.00, because it artificially and unduly burdens access to appellate review?

12. Does such a graduated, ceilingless appellate-record-preparation fee violate the Fourteenth Amendment's equal protection clause because it varies from one appeal to the next without a rational state reason for the variable fee?

13. Does such a graduated, ceilingless appellate-record-preparation fee that is paid to, and used exclusively by, a government entity *that does not fund the state court system* violate the Fourteenth Amendment's equal protection clause because it irrationally bases the amount of an appellant's tax contribution to that government's general fund upon the size of the court record in the lawsuit being appealed?

14. **Does a federal appeals court have Article III jurisdiction to resolve an appeal by novel interpretations laws and by declaring entirely new rules of law yet do so in an order that by that court's rule is uncitable as precedent? If so, does such resolution of an appeal violate the Fifth Amendment's due process and equal protection guarantees?**

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## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were as follows:

Appellant: Beverly B. Mann

Appellees: Dorothy Brown, as Clerk of the Circuit Court of Cook County, Illinois, and Cook County, Illinois

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735 ILCS § 5/13-217:

Illinois Supreme Court Rule 273

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## CONSTITUTIONAL, STATUTORY AND PROCEDURAL-RULE PROVISIONS AT ISSUE

1. United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. United States Constitution, Amendment XIV, § 1:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Constitution of the State of Illinois, Article I, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

5. Counsel's Liability for Excessive Costs, 28 U.S.C. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

6. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit, 28 U.S.C. § 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be Authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

7. Tax Injunction Act, Taxes by States, 28 U.S.C. § 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

8. Federal Rule of Civil Procedure 8(c):

(c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud,

illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

9. Reversal or Dismissal, 735 ILCS § 5/13-217:

In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue.

10. Illinois Supreme Court Rule 273:

> Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action,

other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

11. Original Actions in the Supreme Court Pursuant to Article VI, Section 4(a) of the Constitution, Illinois Supreme Court Rule 381(a):

Motion for Leave to File; Only Issues of Law Considered. Proceedings in the supreme court in original actions in cases relating to revenue, *mandamus*, prohibition, or *habeas corpus*, and as may be necessary to the complete determination of any case on review, shall be instituted by filing a motion, supported by explanatory suggestions, for leave to file a complaint seeking appropriate relief. Only issues of law will be considered. The proposed complaint shall be sworn to and shall contain or have attached to it the lower court records or other pertinent material that will fully present the issues of law. If the motion is filed when the court is not in session and the case arises from the second, third, fourth, or fifth judicial district, the movant shall file the original and one copy with the clerk in Springfield and send a copy to each justice of the court at the justice's district chambers. If the case arises from the first judicial district (Cook County), the movant shall file the original motion and five copies with the clerk in the Chicago satellite office and send a copy to each justice from the second, third, fourth, and fifth districts at the justice's district chambers.

12. Fees-Counties of 3,000,000 or More, 705 ILCS §105/27.2a(k):

§ 27.2a. The fees of the clerks of the circuit court in all counties having a population of 3,000,000 or more inhabitants in the instances described in this Section shall be as provided

in this Section. The fees shall be paid in advance and shall be as follows:

(k) Certification, Authentication, and Reproduction.

(2) Court appeals when original documents are forwarded, under 100 pages, plus delivery and costs; $75.
(3) Court appeals when original documents are forwarded, over 100 pages, plus delivery and costs, $150.
(4) Court appeals when original documents are forwarded, over 200 pages, an additional fee of 25 cents per page.

13. Contents of the Record on Appeal, Illinois Supreme Court Rule 321:

The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, unless the parties stipulate for, or the trial court, after notice and hearing, or the reviewing court, orders less. The common law record includes every document filed and judgment and order entered in the cause and any documentary exhibits offered and filed by any party. Upon motion the reviewing court may order that other exhibits be included in the record. The record on appeal shall also include any report of proceedings prepared in accordance with Rule 323. There is no distinction between the common law record and the report of proceedings for the purpose of determining what is properly before the reviewing court.

14. Illinois Supreme Court Rule 20(a):

Certification. When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be

determinative of said cause, and there are no controlling precedents in the decisions of this court, such court may certify questions of the laws of this State to this court for instructions concerning such questions of State law, which certificate this court, by written opinion, may answer.

15. Seventh Circuit Rule 53(c).Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States:

(c) *Guidelines for Method of Disposition*.

(1) *Published opinions*.

A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) *Unpublished orders*.

When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may

not be complete or detailed.

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## CITATIONS TO UNPUBLISHED ORDERS

This lawsuit was filed on December 16, 1998, in the Federal District Court for the Northern District of Illinois, Eastern Division as a petition for preliminary injunction and for writ of mandamus and prohibition (No. 98 C 8004). (App. G.) On March 2, 1999, the petition for preliminary injunction was denied in an unpublished order, and an immediate appeal was taken (No. 99-1750. While that appeal was pending, Respondents filed a Rule 12(b) motion to dismiss the petition for writ of mandamus and prohibition. On August 3, 1999, that motion was granted in an unpublished memorandum order (App. G), and an appeal from that order was taken, too (No. 99-3595), The consolidated appeals were resolved in an unpublished order issued on August 31, 2001, recorded at 2001 U.S. App. LEXIS 19829. (App. A.) A successive unpublished order issued on September 19, 2001 directed Petitioner, sua sponte, to pay $5,180.00 pursuant to 28 U.S.C. § 1927 (App. B), and a final successive unpublished order issued on October 16, 2001 prohibits her from ever again filing any documents in any federal court within the Seventh Circuit until she pays the sanction ordered in the September 19, 2001 (App. C.). Both successive orders are recorded at 99-1750 and 99-3595. On October 19, 2001, the district court entered a minute order and a judgment dismissing the lawsuit for lack of subject matter jurisdiction. (App. D.)

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On August 31, 2001, the Court of Appeals vacated a Fed. R. Civ. P. 12(b)(6) judgment issued on the merits and remanded the case to the district court with instruction to dismiss the lawsuit for lack of subject matter jurisdiction. The August 31 order and an accompanying Rule to Show Cause .(App. B) also, sua sponte, directed Petitioner to show cause within 14 days why she, a nonpracticing attorney pro se,

should not be required pursuant to 28 U.S.C. § 1927 to pay personally Respondents' costs and attorneys' fees for the litigation in both the district and appeals courts. The same order directed Respondents to file with the court an estimated bill of costs and market-value hourly fees for their in-house counsel (assistant state's attorneys), returnable concurrent with Petitioner's response to the Rule to Show Cause. (App. C.) As the August 31 order acknowledges, Respondents had asserted none of the several supposed affirmative defenses upon which the court resolved the appeal, and the August 31 order was Petitioner's first notice of, and therefore her first opportunity to address, the purported defenses.

On September 19, 2001, a few days after Petitioner filed a 17-page, single-spaced, multi-sectioned response (App. E) and Respondents filed their estimate of costs and fanciful attorneys' fees, the court issued an unpublished order directing Petitioner to pay $5,180.00 (the full amount stated by Respondents) to the Office of the State's Attorney for Cook County, Illinois. She was ordered to pay the full amount within 14 days and to file with the court a proof of payment. (App. B.) In her response to the Rule to Show Cause, Petitioner had contended that under the respective appropriate choice of laws (mostly Illinois law) *none of the affirmative defenses actually exists* and that only one of the defenses is nonfrivolous, and indeed the two-paragraph September 19 order appears to retreat from all but one of the grounds stated in the August 31 order – grounds anchored largely in a state-court products liability lawsuit against a private corporation that was not a party to *this* lawsuit – and it appears to add an additional ground. The September 19 order also appears to depart significantly from the court's August 31 definition of "vexatious" conduct under 28 U.S.C. § 1927, starkly lowering the threshold for sanctionable conduct under that statute so that it is indistinguishable from the so-called British "loser pays" fee-shifting rule.

Petitioner did not pay the sanction, and on October 16, 2001, the court issued an order prohibiting her from ever again filing any documents in her own behalf, and prohibiting

anyone else from filing any documents on her behalf, in any federal court within the Seventh Circuit until she pays the sanction. The order exempts habeas corpus petitions and filings in criminal cases, but it includes any civil lawsuit removed from state court by another party and any lawsuit filed against her in federal court – even, say, a diversity action stemming from a traffic accident (and Petitioner thinks this might render her uninsured in such a case). It provides that after two years she can request amendment or vacatur of the order. (App. A.) Petitioner appeals from all four orders of the court of appeals.

## STATEMENT OF THE CASE

Petitioner Beverly B. Mann, a nonpracticing attorney, filed a precursor to this lawsuit on her own behalf on September 28, 1998, in federal district court in the Northern District of Illinois, Eastern Division. The case was captioned *Beverly B. Mann v. Aurelia Pucinski, as Clerk of the Circuit Court of Cook County, Illinois, and Cook County Illinois*, No. 98-6087, and assigned to District Judge Harry D. Leinenweber. The complaint was filed as a petition for preliminary injunction and for writ of mandamus and prohibition.

Mann was challenging the constitutionality of a subsection of a lengthy statutory scheme known as the Illinois Clerks of Courts Act. The subsection, 705 ILCS § 105/27.2a(k)(4), requires the payment of $.25 per page for each page over 200 for the county court clerk to prepare a court record for appeal. The subsection immediately preceding it, § 105/27.2a(k)(3), requires a threshold payment of $150 for the preparation of the first 200 pages. The per-page fee is ceilingless and can total several thousand dollars. And while the fee *rate* is the same for each appeal the fee amount itself varies from one appeal to the next, sometimes by thousands of dollars.

Under Illinois Supreme Court Rule 321, the entire court record must be prepared and transferred to the appellate court unless a court order is obtained permitting the severance of the

relevant portion of the record from the remainder of it. This Rule applies irrespective of the size of the court record, or the number of lengthy redundant exhibits (such as deposition transcripts) in it, or the proportion of the record that is relevant to the issues to be addressed on appeal. The Rule, together with the statute itself, inevitably makes the costs of appealing against a party represented by a mega law firm inordinately expensive because of the cultural (and legal-fees-generating) propensity of those firms to file Manhattan-phone-book-size volumes of exhibits with each installment in their obligatory unending procession of motions. That is how litigation is practiced these days, and a single lengthy deposition transcript or set of business records, for example, might appear in a court record four or five or six times. (Mann has joked that the inner two-thirds of these phone-book-size exhibits volumes really is a phone book, placed in there as padding with the knowledge that no judge will ever actually read most of the thing.)

The federal appeals court's August 31 order's assertion to the contrary notwithstanding, the fee is paid to and (as per Illinois statute) *is used exclusively by the county, although under Illinois law the county pays no part of the funding for the trial or appellate courts*, facts that Mann detailed in both briefs she filed with the appeals court; as provided in the state's constitution, the state pays the entire costs of both the trial court and the appellate court system (with the exception of the costs of running the respective county *trial-court* clerks', but *not* the appellate-court clerks' offices). See *Lee v. Pucinski*, 267 Ill. App. 3d 489, N.E.2d 769 (1994). The fee payments, on the other hand, are commingled into the county's general revenue fund and used entirely to pay the general expenses of the county government; no portion of it is turned over to the state. See *Lee*.

To reiterate for clarity: No part of the fee, which sometimes amounts to thousands of dollars, is turned over to the government entity that actually funds the state courts; no part of the fee is used to pay for the operation of any part of any of the courts, except the county trial-court court clerk's

office, and no part of the fee is used to fund even the appellate court *clerk's* office (which the state funds entirely). The entire fee is used to pay the expenses of the county government, yet it is the state government, via statewide taxes, not the county government that funds the state court system.

Thus as a prerequisite to appellate review appellants must pay a variable fee (or tax) of several hundred or even several thousand dollars – *not* toward the expenses, such as judicial salaries, of the state court system but toward the expenses of the general county government (e.g., the County jail, the Metropolitan Sanitary District, the Water Reclamation District, the Forestry Service, the Property Tax Assessor's Office, the Recorder of Deeds).

This was a key *fact* essential to Mann's constitutional challenge, a *fact* she discussed at length in her briefs yet that the federal appeals court got flat-out wrong. The court's overt error on this point serves as a neon sign that no judge (nor law clerk) read either of her briefs before that court sanctioned her with a $5,180.00 fine.

And it is far, far from the only such advertisement. The August 31 order is so rife with outright error of fact, including about the very nature of Mann's primary constitutional challenge and almost everything else she actually wrote in her briefs themselves, that – the formal legal effect of the order aside – it is clear that there was no appellate review here at all. Mann asks this Court to perform the obligation that was the appeals court's and that that court declined to perform yet said it had.

And she asks this Court to consider the extent to which due process is required before an appeals court acting sua sponte can declare a litigant or an attorney acting on behalf of a litigant guilty of sanctionable conduct, whether under 28 U.S.C. § 1927 or under any other statute or rule, codified or not, and then impose a substantial sua sponte fine, and then impose a contempt sanction for failure to pay the fine. Mann was accorded no notice whatsoever before the first and third of these court actions.

The five-page August 31 order was the first notice Mann received that the court had even *asserted* the affirmative defenses on behalf of the defendants-appellees. Yet the order made it clear that she stood convicted of conduct sanctionable under 28 U.S.C. § 1927 – that her response, to the extent it would be considered at all, would be considered only for purposes of sentencing, sort of like the statements that convicted felons are allowed to make to the court at the sentencing hearing although the sentence already has been determined by the sentencing guidelines and by the prosecutor's pre-sentencing report.

For Mann, the mandatory minimum sentence was the amount that the appellees would claim in their bill of fanciful expenses, the one that was returnable on the same day as her pre-sentencing statement. That amount turned out to be $5,180.

The court then cited *Support Systems Int'l v. Mack*, 45 F.3d 185 (7th Cir. 1995), its rabbit-out-of-a-hat authority, for the particular contempt penalty it imposed without due process of any sort; *Mack* requires none, and Mann asks this Court to consider the constitutional propriety of that.

She also asks this Court to consider whether an appeals court can completely abrogate the adversarial process in a civil lawsuit by asserting defenses or claims on behalf of a litigant who had not asserted them and by then resolving the entire lawsuit on the basis of those sua sponte defenses or claims – without first apprising the opposing party of those defenses or claims, much less according that party an opportunity to address them before the appeal is resolved. See *Singleton v. Wulff*, 428 U.S. 106 (1976).

That is what happened here; no one but the appellate panel played a role in presenting virtually any of the issues upon which the actual appeal was resolved – not the district court and not the parties – except as foil and stooge. The issues were litigated, so to speak, entirely within the vacuity that is that appeals court. But it was curious conduct by that court particularly given that in *criminal* cases such action by an appeals court on behalf of the defendant is stringently

regulated, and nearly always prohibited, by the straightjacket enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), a stricture under which the 7th Circuit Court of Appeals gives no indication of chafing.

And in what Mann regards as a particularly outlandish frolic, that court issued its sanction based in stated part upon alleged misconduct by Mann in the products-liability case the appeal in which prompted Mann to file this lawsuit and which confers upon her the legal standing to challenge the court-record preparation fee. This although (contrary to the statements of the appellate court in that case; more about this below) *Mann was never sanctioned for anything whatsoever in that litigation*, and most of what the federal appeals court said about that litigation is verifiably erroneous. The first five pages of Mann's response to the August 31 order address this, point by point by point. (App. E; see, also, App. J.) Mann asks this Court to consider the jurisdiction and due process issues concerning a federal court's issuance of a sanction based in part upon alleged misconduct in another, if tangentially related, lawsuit litigated in state court.

The appeals court's unilateralist approach ignored even the district court's discussion of the effect of the seminal state-court order discussed below and the applicability (or, more accurately, the inapplicability) of the *Rooker-Feldman* doctrine to it, one of the two grounds the appeals court ultimately stated for the sanction in its September 19 sanction order and certainly the very guts of the August 31 order. The state-court order, though, was *not* a judgment and, under Illinois law, *was not even appealable*. It was nothing more than a denial of a motion to join a collateral issue and a collateral defendant, an order that under Illinois law has no res judicata effect whatsoever regarding the merits of the issue sought to be joined, and was nonappealable because the option remained to file it as a separate lawsuit. See, e.g., by analogy, *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, N.E.2d 338 (1998).

The district court had addressed the issue at length, but the appeals court appears unaware of this; in any event it

didn't even mention it. Yet this was one of only two issues that the appeals court discussed that even was mentioned by anyone other than the appeals court who was involved in this litigation. And although the district court's memorandum order normally is the first thing that court's judges read when reviewing an appeal, see *U.S. v. Rogers*, 01-2097 (7th Cir. Oct. 25, 2001), there are appeals in which the district court's memorandum opinion is not even the *last* thing *any* judge reads.

Mann's appeal was among the latter. There is a remarkable correlation between, on the one hand, the very few issues that the appeals court discussed that overlapped with the issues that the district court and Mann had addressed and, on the other hand, the issues that the appellees chose to mention in their brief. The appeals court's knowledge of the contents of Mann's briefs and of the district judge's memorandum appears to have been filtered entirely through the prism of the appellees' brief, which simply failed to acknowledge the most significant issues, facts and arguments Mann presented and instead addressed only the others.

Mann was challenging the graduated, ceilingless record-preparation fee because as the primary appellant in cross-appeals in a pharmaceutical products liability lawsuit, she was required to pay more than $1,600.00 for the preparation of the court record after her motion pursuant to Illinois Supreme Court Rule 321 for severance of the relevant portions of the record was denied. But the fee applies in *every type of litigation*, criminal and civil, including dissolution of marriage, child custody, adoption and probate, as well as to personal injury and products liability lawsuits. The federal appeals court's August 31 misstatement to the contrary, Mann's constitutional challenge was *not* limited to her own case, a logical impossibility in any event given the mandatory language, the specificity and the rigidity of the statutory subsection and thus its unseverable application to nearly all appeals with court records in excess of 200 pages. (Mann wrote in her primary brief at p. 4, "The statute applies to all types of cases, including criminal, dissolution of marriage,

child custody, adoption and probate, as well as to personnel injury and products liability lawsuits." She included a similar sentence in her other brief and in most of the documents she filed with the district court, including her petitions and her response to the defendants' Rule 12(b)(6) motion.)

Mann filed her initial federal complaint two days after she tried and failed to have the state-court judge who had heard the products-liability lawsuit (which by then had been on appeal for nearly three months) agree to hear an emergency motion seeking a declaration that § 105/27.2a(k)(4) violates three provisions of the Illinois state constitution, most significantly here Art. I, sec. 2, which mirrors the due process and equal protection clauses of the Fourteenth Amendment. Mann made no federal constitutional challenge to the statute.

She served notice of the motion on counsel for The Upjohn Company, her opponent in the products-liability case. The respondents in *this* lawsuit, of course, were not parties to the state-court case, but Mann served them with notice of the motion anyway. Neither Upjohn nor these respondents filed a written response to the motion.

The hearing on the motion lasted ten minutes or so. The judge declined to consider any of the state or federal constitutional challenges to § 105/27.2a(k)(4), finding that the issues they presented were too far removed from those in the products-liability case and that there was not an identity of parties or parties-in-interest other than Mann in the two matters, a requirement under Illinois law. The judge denied the Rule 321 portion of the motion because Upjohn's counsel objected to it on the ground that he and Upjohn's other appellate counsel in the case (both of them appellate specialists) had not been involved at the trial stage (although they were law partners of those who were) and therefore needed the entire court record while drafting the briefs.

"File another lawsuit," she told Mann, a line the judge would repeat in a replay hearing a few weeks later (see discussion below), a quote Mann has repeated time and again, orally and in writing, during the course of this federal litigation, including in her brief in appeal no. 99-1750.

An assistant state's attorney did attend the hearing, but no court reporter was present.

By custom in the Cook County Circuit Courts, moving counsel handwrites such orders, and Mann drafted the one on her motion, carelessly writing but a single sentence stating that the motion was denied. The judge signed the order. Later that day, Mann filed her initial federal-court petition (No. 98-6087), which included a request for a preliminary injunctive relief requiring the Cook County Circuit Court Clerk to release the (already-prepared) court record for transfer to the appellate court without further payment by Mann. (Mann already had paid the threshold $150.00.) At the hearing on her request for the preliminary injunctive relief (her state-court appeal was about to be dismissed for failure to have the court record transferred to the appellate court), Mann told District Judge Leinenweber about the state-court hearing two days earlier; she told him exactly what the state-court judge had said and what she, Mann, had written in the order. The assistant state's attorney who had attended the state-court hearing also attended the federal-court hearing, and she did not dispute Mann's account of the state-court judge's statements.

But Judge Leinenweber said that, given the wording of the state-court order, he thought the *Rooker-Feldman* doctrine barred federal district court jurisdiction, and he dismissed the case for lack of subject matter jurisdiction. (App. G.) Later that day, Mann learned during a discussion with the chief deputy clerk (who last year was promoted to Clerk) of the Illinois Appellate Court, First Division (the division that serves Cook County), that she could bring the matter directly to the Illinois Supreme Court via a petition pursuant to Illinois Supreme Court Rule 381(a), which reads in relevant part:

> Motion for Leave to File; Only Issues of Law Considered. Proceedings in the supreme court in original actions in cases relating to revenue, *mandamus*, prohibition, or *habeas corpus*, and as may be necessary to the complete determination of any case on review, shall be instituted by filing a motion, supported by explanatory suggestions, for

leave to file a complaint seeking appropriate relief. Only issues of law will be considered.

So Mann filed a Rule 381 petition, a move that the federal appeals court derides without explanation as conduct sanctionable under 28 U.S.C. § 1927, in the same order in which it also skewers her for what it says is her sanctionable failure to comply with the Tax Injunction Act, 28 U.S.C. § 1927 by litigating the constitutional challenge in state rather than in federal court. The Illinois Supreme Court denied the Rule 381 petition, as the federal appeals court notes gleefully.

Soon afterward, on November 19, Mann presented another emergency motion to the same state-court judge who had refused to consider her earlier one. She titled it, "Motion for Leave by the Parties to Jointly Remove Most Documents from the Court Record in Order to File Them Independently with the Court of Appeals in Supplement to the Record, or, Alternatively, to Find Unconstitutional Subsection (k) (4) of the Illinois Clerk of Courts Act, 735 ILCS 105/27a (k) (4)". This time, her motion challenged the statute of federal constitutional grounds, arguing that it violated the due process and equal protection clauses of the Fourteenth Amendment.

Again she served notice on both Upjohn's counsel and the present respondents' counsel, and counsel for each attended the hearing. At the hearing, which like the earlier one lasted about 10 minutes, Mann mentioned the judge's order on the earlier motion, saying that the judge had "denied" the motion. To Mann's astonishment, the judge became visibly upset and said she had NOT denied the motion; she had declined to HEAR the motion. Mann recounted the incident as follows in her brief in appeal no. 99-1750:

> [The judge had declined to consider the earlier motion], she said, because the issue of the constitutionality of the appellate fees statute was not a part of, and was utterly collateral to, the underlying products liability lawsuit before her. She said that Illinois law allowed her the option to decline to accept jurisdiction to hear motions regarding collateral matters that were not earlier before

her, and that she was exercising that option. "File another lawsuit," she told Mann. [Docs. # 22, 28, 43.]

The judge said she signed the order in error. (As Mann recounted in her brief), this time the judge insisted upon dictating the specific language of the order as Mann wrote it down. The order reads in full:

> This cause coming on to be heard on plaintiff's Motion for Leave by the Parties to Jointly Remove Most Documents from the Court Record in Order to File Them Independently with the Court of Appeals in Supplement to the Record, or, Alternatively, to Find Unconstitutional Subsection (k) (4) of the Illinois Clerk of Courts Act, 735 ILCS 105/27a (k) (4), it is ordered that:
>
> 1. The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.
> 2. The motion to remove documents from the record is denied on the basis that the court lacks the authority to allow it.

That was the extent of Respondents' attorneys' involvement in what the federal appeals court references in its August 31 order *and* in its September 19 sanction order as the state-court portion (as opposed, of course, to the federal-court portion) of *this* lawsuit. It is a pure fiction.

Armed with the November 19 state-court order stating definitively that these were not a single case,[1] Mann filed a motion with the federal district court pursuant to Fed. R. Civ. P. 60(b)(1) requesting relief from the dismissal judgment in case No. 98-6087. But the district judge denied the motion, saying that the situation was not the type of mistake contemplated by or within the purview of Rule 60(b)(1) or any

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[1] There are several copies of that handwritten order in the record on appeal in *this* litigation. Mann, though, was unable to format a legible scan of the handwritten (scribbled, actually, as it is in Mann's hand) order to fit into the parameters of the appendix..

other subsection of that Rule. (He didn't say what situation, exactly, might be within that purview, if not this one.)

So, after the judge denied two successive motions for reconsideration, and still armed with the state-court order removing the jurisdictional bar, Mann refiled the lawsuit, as No. 98-8004. The federal appeals court found this sanctionable under § 1927, although notably that court did *not* say that the district judge *properly* had denied Mann's Rule 60(b) motion and did *not* find that the judgment order in No. 98-6987 *precluded* the refiling. The appeals court, in fact, provided no explanation whatsoever for this finding, nor can Mann fathom any basis for it, as the grounds for the dismissal of No. 98-6087 for lack of jurisdiction had been eliminated. Best as Mann can tell, the appeals court is saying that the refiling was sanctionable by virtue of its being a *re*filing, although Mann knows of no such blanket rule of law and the court certainly cited to none.

In order to enable her to obtain a ruling on her petition for preliminary injunction, Mann sought and obtained from the state appellate court a succession of orders extending the date by which the record on appeal had to be filed with that court. On March 2, 1999, the district court denied her petition for preliminary injunction. On March 25, 1999, Mann filed her notice of appeal, invoking the appellate jurisdiction conferred by 28 U.S.C. § 1292(a)(1), another deed that the appeals court found sanctionable under § 1927, although again that court offered no explanation for its finding; Mann had done nothing more than avail herself of an available (or at least apparently available) appellate jurisdictional statute.

A hallmark of the appeals court's rulings in this case is its unremitting yet unexplained claims that Mann's compliance with a variety of jurisdictional and other procedural laws and with explicit judicial instructions and findings renders her the Bonnie Parker of civil litigation and therefore deserving of severe summary punishment.

Shortly after she filed her notice of appeal from the denial of her petition for preliminary injunction, Mann paid the remainder of the $1,635.00 record-preparation fee in the state-

court appeal – a fact that the federal appeals court indicated it did not know but that it would have known had anyone at that court read either of Mann's briefs.

Mann filed her brief in that appeal on July 7, 1999. On August 3, 1999, the district court granted the defendants' Fed. R. Civ. P. 12(b)(6) motion on the merits of the constitutional challenges, which they had filed after Mann filed her notice of appeal from the denial of her petition for preliminary injunction. Mann filed a motion to vacate the dismissal, relying upon a sentence and case citation in the 1999 edition of the Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, distributed by none other than the United States Court of Appeals for the Seventh Circuit. Her motion quoted the following from p. 29 of that Handbook: "If the appeal is interlocutory, the district court retains the power to proceed with *matters not involved in the appeal* or to dismiss the case as settled, thereby mooting the appeal. [Emphasis added.] *Shevlin v. Schewe*, 809 F.2d 447, 450-51 (7th Cir. 1987)."

Mann argued in her motion that the judge lacked jurisdiction to enter the August 3, 1999, order because the motion that the order granted addressed the same substantive issues that Mann's motion for preliminary injunction had addressed, the denial of which was the subject of the interlocutory appeal. Once Mann filed her notice of interlocutory appeal on April 1, 1999, She argued in her motion, the judge was divested of jurisdiction to resolve those issues, absent the filing of a second motion for preliminary injunction. She attached a copy of p. 29 of the Handbook as an exhibit to her motion – a fateful decision the repercussions of which Mann, suffice it to say, could not foresee.

It turns out that the sentence immediately following the one Mann quoted from the Handbook read: "But when a preliminary injunction has been appealed and a new motion for preliminary injunction is filed, there is no jurisdictional bar to the district court resolving that motion; however, the district court's ruling may, as a practical matter, moot an earlier ruling

on, and also the appeal of, a preliminary injunction." It then cited *Adams v. City of Chgo.*, 135 F.3d 1150 (7th Cir. 1998).

The judge read the full paragraph on the page Mann had attached as an exhibit to her motion and, at the hearing on the motion, confused that paragraph with what Mann had written in her motion. He sanctioned her on the spot for her supposed citation to *Adams v. City of Chicago*, the case cited in the portion of the paragraph in the Handbook from which she took her quote but that she did not quote. The judge thought *Adams* inapposite and ordered Mann to pay $100.

When Mann appealed from the August 3 dismissal order she also appealed from the $100 sanction order, contesting not only the substantive ground for the sanction but also the judge's failure to comply with the due process requirements stated in Fed. R. Civ. P. 11, the Rule the judge said he was invoking. She supplied the appeals court with a transcript of the hearing. (App. G.) The appeals court's take on the matter: "(Mann's motions were denied and she was ordered to pay $100 to the defendants under Fed. R. Civ. P. 11)."

And that was the most ingenuous statement in either of the two § 1927 orders, both of which rely for their result mainly upon the fiction that the state-court products liability lawsuit and the federal-court fee-challenge case are portions of the same lawsuit – the state-court judge's express ruling to the contrary notwithstanding. It is, of course, hard to shoot straight in the dark, and Mann had presumed that this court's mischaracterization of the nature of the state-court order (and this court's failure to quote or paraphrase the order) was due to the failure of any judge to read the actual order or to read my initial brief, which quoted it in full, and to a blind reliance upon a law clerk's mischaracterization of it. But while reviewing the court record when drafting this petition in order to get another copy of one of the district court's orders because she had misplaced mine, Mann saw to her dismay, near the very front of the prepared record, a blue bookmark-sticker tab attached to a copy of the state-court order, the sticker bearing the handwritten notation, "State court order." It was the only tab in the entire prepared record, which was

otherwise devoid of indication that anyone had reviewed any of it; the volumes' bindings appeared nearly uncracked.

The appeals court said in both the August 31 and September 19 per curiam orders that it was basing its sanction largely upon her failure to adhere to *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, yet the court itself knew all along that *Pennzoil* did not apply. In the August 31 order that court wrote:

> [In *Pennzoil*], Texaco had to present its constitutional arguments to the state judiciary, with the option to seek review in the Supreme Court under 28 U.S.C. § 1257. Mann should have proceeded in the same way. After the state's trial judge rejected her contention, she should have sought review within the state system and then, if necessary, by the Supreme Court of the United States. Instead she bolted to federal district court, which under *Pennzoil* can offer no relief.

The court knew even as it wrote that that the only contention of Mann's that the state's trial judge rejected was that the state-court judge *consider* the fees challenge *as part of the products liability case*.

That court also knew, as it indicated shortly afterward in *Durgins v. City of East St. Louis, Illinois*, Nos. 00-3271 and 00-3486 (7th Cir. Nov. 16, 2001), that under 28 U.S.C. § 1738, state law governs the preclusive effect of state-court judgments. (See, also, *Kamen v Kemper Financial Services, Inc.*, 500 U.S. 90 (1991).) *Durgins* cites *River Park v. Highland Park*, 184 Ill. 2d 290 (1998), which states that orders denying motions for joinder operate as they would in federal court; that is, they have no preclusive effect except concerning the denial of joinder. *River Park* relies upon Illinois Supreme Court Rule 273, which, the opinion says, operates like Fed. R. Civ. P. 41(b). Illinois Supreme Court Rule 273 reads: "Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits."

*Durgins* was written by Circuit Judge Frank H. Easterbrook, as were the August 31 and September 19 per curiam orders in Mann's case. That judge two years ago, in a case called *Johnson v. Supreme Court of Illinois*, 165 F.3d 1140 (7th Cir. 1999), wrote:

> [D]ecisions of state courts — and the disbarment was a judicial action of the Supreme Court of Illinois, see *Levin v. Attorney Registration and Disciplinary Commission*, 74 F.3d 763, 766 (7th Cir. 1996) — may not be contested in the inferior federal courts. Only the Supreme Court of the United States may review the decision of the Supreme Court of Illinois. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).
>
> *Feldman* itself held that challenges to the rules used to license or discipline attorneys may be contested under sec. 1983 *if they are separable from the decision in an individual* licensing or disciplinary case, see also *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 227 (7th Cir. 1993), but Johnson does not contend that any discrete rule adopted by Illinois violates the Constitution; instead he seeks damages on account of the outcome of his particular case, the core of the *Rooker-Feldman* doctrine.

The passage solves the mystery of why (as mentioned above) the August 31 order claimed downright absurdly that Mann's constitutional challenge was limited to her own case. The passage also explains why the appeals court's August 31 and September 19 orders liquefied the products-liability case and the fee-challenge cases into one – why those orders unseparated the two lawsuits after the state-court judge had unequivocally separated the two legal matters. Although decisions of state courts may not be contested in the inferior federal courts (not by the parties anyway) they apparently can be *superceded* by inferior federal courts in unpublished orders in furtherance of a loony jihad to divest federal courts of original jurisdiction in federal civil rights cases, even if (for

now) only in those cases ultimately determined by unpublished and uncitable – and therefore unpublicized – appellate order. Or in furtherance of a judicial vendetta.

Well, temporarily anyway. Among the slew of errors of Illinois law that that court made in its August 31 order is its statement that although that court was ordering district-court abstention and the entry of a judgment dismissing the lawsuit for lack of subject-matter jurisdiction Mann no longer could have the substantive issues considered by Illinois courts because the appeal in the products-liability lawsuit was over. (According to a notation on the August 31 order, the case was not even submitted to the three-judge panel for consideration until August 15, 2001, fully 19 months after completion of briefing in the consolidated appeals and – perhaps not coincidentally – one day after the Illinois appellate court denied Mann's motion for rehearing in the appeal in the products-liability case. Mann has filed a petition on that case with the Illinois Supreme Court. App. F, first two sections of Mann's petition to that court. A ruling on the petition is expected on December 5.)

But just as counsel is obliged to research the law before filing suits (see the September 19 sanction order), judges presumably are required to research the law before determining appeals on the basis of their presumptions or hunches about the law, and certainly before issuing a severe sanction on the basis of an unresearched and erroneous one, or two, or three, or .... And had that court researched Illinois' "savings" statute, 735 ILCS § 5/13-217, it would have known that *Mann can* refile the fee-challenge lawsuit in Illinois state court within one year after the entry of the district court's judgment dismissing the case for lack of jurisdiction.

She can and, of course, now she must, because that way she will establish that under Illinois law the two cases really *are* two cases, not one, and that the state-court order declining to consider the constitutional challenge to the fee statute *really* was *not* a judgment on the merits of the constitutional challenge and instead was a nonappealable order with no res

judicata effect whatsoever except concerning the denial of joinder with the products-liability case.

So Mann will establish in Illinois state court that the federal appeals court sanctioned her for violating nonexistent Illinois law. And who then will reimburse her for the huge amount of time and all the money she will have spent by then (she already has spend a huge amount of time and a lot of money on this since August 31) for the federal appeals court's having unreasonably and vexatiously caused such multiplication of these proceedings?

"The path we choose allows the states to interpret their laws and supply more concrete rules, see *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976)," Judge Easterbrook wrote for the en banc majority in *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999). He and his colleagues chose a different path here.

Of course, that court sanctioned her for violating nonexistent *federal* law as well; the court sanctioned her for her failure to comply with a supposed rule of constitutional law that requires the exhaustion of any available state constitutional claims as a prerequisite to a federal-court lawsuit under 28 U.S.C. § 1983 challenging the federal constitutionality of a state or local law or uncodified public policy. But this proclamation of purported law certainly appears to conflict with extensive precedent of this Court and of that court. Illinois' constitution mirrors the entire panoply of federal constitutional civil rights; e.g., due process and equal protection (Art. I, sec. 2), free exercise of religion (Art. I. Sec 3), just compensation for property "takings" (Art. I, sec. 15), protection against the passage of ex post facto laws and laws impairing contractual obligations (Art. I, sec. 16), freedom of speech (Art. I, sec. 4), right to freely assemble and petition (Art. I, sec. 5), freedom from unreasonable searches and seizures (Art. I, sec. 6).

That court *regularly* rules upon the substantive merits of federal constitutional challenges to Illinois state or Illinois local governmental laws and uncodified policies. See, e.g., *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7th Cir. 2000); *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir.

2000); *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999). And this Court occasionally hears such cases on their merits, cases litigated on the substantive merits in federal district court in Illinois and in that very appeals court; e.g., *Hope Clinic v. Ryan*, 120 S. Ct. 2738, 2739 (2000).

Mann is certain that this Court has never found such an exhaustion requirement nor has that appeals court in any published ruling. That proclamation of constitutional law is facially ridiculous. Yet three appeals court judges signed onto the order that proclaimed it.

On September 28, Mann filed a motion to stay the mandate in order to enable her to file a motion for en banc rehearing on the sanction order. (App. H.) On October 1, she filed a supplement to that motion in which she noted that she planned to invoke Illinois' "savings" statute to refile the case in Illinois state court. (App. I.) On the same day, her motion to stay the mandate was denied, in an order issued by Judge Easterbrook, who (as he advertised to Mann in an order issued on September 5, 2001, ostensibly ruling on a motion she had filed eight months earlier and that by then was moot) had controlled the appeal throughout and had withheld it from panel review for 19 months before presenting his resolution of it to two judges of his choosing for their accord. For more than two years now Mann has been engaged in a grudge match with that judge stemming from 16-year-long litigation in federal court in which she was the plaintiff and from which the present lawsuit is very tangentially derived.

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A digression is necessary here. Mann's pharmaceutical products-liability case, which she filed in Illinois state court in 1991, stemmed from her use of the controversial sleep medication Halcion in the late 1980s. The products-liability lawsuit in turn stemmed indirectly from litigation she pursued in federal court for sixteen years that wended through three sets of appeals and in which she filed petitions for writs of certiorari with this court in 1999 and 1996. (*Beverly Mann v. City of Chicago, et al.*, 99-1103; *Beverly Mann v. City of Chicago, et al.*, 96-260.)

It was because of financial and other stresses caused by her federal litigation that she used that drug – for two years at high dosages. (The FDA now approves the drug for no longer than 10 consecutive days' use, and recommends a dosage one-forth the strength at which Mann used it.) But in an odd twist, her use of the drug severely affected her mental capacity and physical health at a critical juncture in that litigation, and (as she made clear from its inception) that is why she filed the products liability lawsuit.

But that federal litigation – which is the basis for the "frequent filer" epithet in the August 30 order – is playing as significant a role at the end of that lawsuit as it did at the beginning of it. And it is the reason for the vitriol in that order and for the $5,180 sanction. That judge played no role in the initial appeal in that lawsuit, in 1995-96, but he headed the panel that summarily affirmed summary judgments entered after remand in the earlier (cross)-appeal in which all but two issues were summarily affirmed, also in an unpublished order. Mann had contended in the second appeal, in 1998-99, that the summary judgments entered after remand conflicted with the remand order in the first appeal, but the appeals court simply ignored that contention and all of Mann's others as well. That judge headed the panel that resolved the second appeal.

This Court on the day after it denied Mann's certiorari petition in that appeal issued its opinion in *Willowbrook v. Olech*, 120 S. Ct. 1073 (2000), ruling precisely contrary to a ruling issued in Mann's case in 1986 dismissing a key equal protection count in her complaint. The issue had particular resonance for Mann because the judge's written comments in dismissing Mann's equal protection count dripped of snideness and venom. Two years later that judge, James B. Moran, recused himself when Mann learned that through a weird series of marriages and divorces he shared four stepchildren with a defendant in her lawsuit. But his snide written comments about Mann were repeated time and again in the litigation and appeared to be the basis upon which summary judgments were entered on most of Mann's

remaining counts a month before trial in 1991. (The *Olech* issue was not an issue in the 1998-99 appeal.)

Mann filed a rehearing petition with this Court (not on the *Olech* issue) in February, 2000, and on April 17, the day that petition was denied, she filed a Fed. R. Civ. P. 60(b) motion asserting the *Olech* issue. In her motion, she also requested the recusal of the district judge, Wayne R. Andersen, because, she believed (and believes), he had granted the summary judgments in 1998 only because Mann had declined to accept a settlement offer of $100,000 and because the judge wanted the case off his docket (he kept complaining about the age of the case and really pressuring her to accept the settlement offer). The judge denied the motion and, because 7th Circuit law requires it in order to avoid waiver of the issue, Mann filed an interlocutory appellate mandamus petition.

The petition remained pending for months, and during that time Mann, who is an occasional freelance writer, wrote an article highly critical of the federal bench that was published in the local law journal. (App. K.) The article (which, Mann quickly learned, received a surprising amount of attention) mentioned by name Judge Easterbrook and his colleague, Circuit Judge Michael S. Kanne. When her mandamus petition remained pending after several months (although circuit rules provide explicitly that such petitions be acted upon promptly), Mann concluded that it would never be ruled on, so she filed a motion for ruling and in anger included as an exhibit a copy of another article she had written for publication (this one for an online legal journal that had solicited the article, but that ultimately did not publish it). That article, written in satire, also named names, specifically the names of Judges Easterbrook and Kanne. (App. L.)[2]

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[2] [2]Stupidly, in reaction to Judge Leinenweber's refusal to grant her Rule 60(b) motion to vacate the dismissal judgment on her initially filed petition, she included as an exhibit to her complaint in *this*, the record-preparation-fee, case a copy of an article she wrote that was published in the local law journal back in 1994 that lamented the disparity in treatment of

In September, 2000, while her mandamus petition remained pending, Mann learned that the son (and only child) of one of the circuit judges who heard the first appeals in that case in 1995-96, Judge Ilana Diamond Rovner, was at that time working as a speechwriter for and policy advisor to Chicago Mayor Richard Daley; the lawsuit was against the City and three former City officials and concerned political-patronage-type issues of law. (Mann had learned a few months earlier of the connection but not that the relationship was ongoing during her appeal. Because the relationship remained ongoing, Judge Rovner recused herself from the second appeal in the case and was replaced by judge Easterbrook.) On October 13, 2000, Mann filed another Rule 60(b) motion, this one based on three arguments, one of which was that Judge Rovner should not have participated in that first appeal, which determined most of the issues in the litigation by simply failing to address them.[3] (App. M.)

Also on that day, the appeals court issued its ruling in Mann's mandamus petition. *In re Mann*, 229 F.3d 657 (2000).

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federal-court litigants depending on their social status or the social status of their counsel. (App. .) The article, it turns out, appears in the appellate record only a page from the state-court order with the bookmark tab on it.[2] Mann learned from the personnel director in the mayor's Office of Policy that Judge Rovner's son Maxwell worked there beginning September 9, 1995, six months after oral argument in Mann's appeal but four months before resolution of it. More recently Mann was told worked he had worked in the mayoral campaign in the spring of 1995. The election was held a few days after oral argument in Mann's case.

[3] Mann learned from the personnel director in the mayor's Office of Policy that Judge Rovner's son Maxwell worked there beginning September 9, 1995, six months after oral argument in Mann's appeal but four months before resolution of it. More recently Mann was told worked he had worked in the mayoral campaign in the spring of 1995. The election was held a few days after oral argument in Mann's case.

Circuit Judge Diane P. Wood wrote the opinion, in which Judges Kanne and Terence Evans concurred. The court got several facts wrong (surprise!), most annoyingly that Mann had litigated the case mostly pro se. (Mann actually assumed her own representation in 1997, after paying nearly $180,000 in attorneys' fees, none of it to herself.) And (surprise!) the court affirmed the denial of the recusal motion, which by then Mann no longer cared about anyway. It also said, "Though this is unimportant for the issues presently before us, we find Judge Andersen's comment about the likelihood of success for Mann's Rule 60(b) motion eminently reasonable. In fact, the motion is entirely frivolous." And it added:

> A final note. In the various papers Mann has filed in connection with her mandamus petition, she has made numerous disparaging remarks about the judges of the Seventh Circuit Court of Appeals. Litigants are understandably disappointed when they do not prevail in court, but that does not give them the license to attack the integrity of the judiciary. Such abusive conduct will not be tolerated, not even from a pro se litigant. Furthermore, Mann's practice of flooding the court with frivolous motions after a suit has been concluded cannot continue. If Mann persists in unprofessional behavior, we hereby reiterate that sanctions will be imposed. See Support Systems Int'l v. Mack, 45 F.3d 185 (7th Cir. 1995) (per curiam).

Mann suspects it was not Judge Wood but Judge Easterbrook who wrote that paragraph.

A few days after that opinion was issued, Mann filed a judicial misconduct complaint against Judge Rovner. Chief Circuit Judge Joel Flaum recused himself, partly because *he* had recused *himself* from the 1995-96 appeal because his son worked as an assistant City attorney and partly because his wife is a close friend of Judge Rovner. (Mann learned the latter in a gossip column item; more below about this gossip column in the Chicago Sun-Times.) So Judge Easterbrook, as next judge in seniority and acting as chief judge, responded, dismissing the complaint and criticizing Mann for writing

with what he characterized as "invective and sarcasm". Mann filed an appeal to the Judicial Counsel, in which she referred to Judge Easterbrook not by name but as the chief-judge-in-training.

And that was just the beginning of their correspondence, which became so frequent – he has ruled on every motion she has filed there in the last year or so and has responded to other things she submitted and other things that, well, occurred involving her – that Mann began thinking of him as her pen pal (notwithstanding that only the "pen" part is apt).

After the resolution of Mann's interlocutory mandamus appeal, Judge Andersen, seemingly unfazed by all the dicta in the appellate opinion, ordered the resumption of briefing. But after completion of briefing, at a hearing on January 16, 2001, he expressed concern about the appeals court's sanctions warning – to which Mann famously responded that she was unconcerned about that court's sanctions threat.

Which ultimately is why the events in *this*, the fee-challenge, case unfolded as they did. Mann filed a motion with the appeals court for amendment of the mandamus-denial opinion, asking the court to delete dicta in it calling her *Olech* motion frivolous, and citing to the transcript of the January 16 hearing in which Judge Andersen said he considered that an instruction to deny the motion. She attached the transcript as an exhibit. Her motion was denied, but apparently not by any member of the panel that had issued the opinion; in any event there was no pride of authorship, as the order simply said it was "by the court". A few days later, on January 25, Judge Easterbrook, as acting chief judge, seemingly out of the blue issued an order reassigning the case from Judge Andersen to Southern Illinois District Judge G. Patrick Murphy, whom Judge Easterbrook was designating to preside in the case until its resolution. Judge Andersen hinted orally to Mann and in his initial recusal order that his sudden recusal was not at his instance (App. N.), and Chief District Judge Marvin Aspen's order effectuating the case reassignment says it was at the behest of Judge Easterbrook (App. O). When Mann inquired about all this with the District Court Clerk, Michael Dobbins,

he suddenly entered a "corrected" docket entry supposedly issued by Judge Andersen stating that his recusal was at his own instance. (App. P .)

At the hearing before Judge Murphy on Mann's motions, all seemed normal (well, almost normal; he said he thought her Rule 60(b) *Olech* motion might have merit) except for the presence of a marshal in the small magistrate's courtroom borrowed for the occasion. Normal, that is, until near the end of the hearing, when the judge, after denying her motions (normal), barred her from filing any more "papers" in that lawsuit without his written authorization and – pointing to the thoroughly embarrassed elderly marshal-as-stage-prop – said he would "put [her] in jail" if he adjudged as frivolous anything she tried to file (abnormal, even for that lawsuit). A few days later, as promised, he memorialized this in a memorandum order, the highlight of which reads, "Although an extreme remedy, imprisonment is warranted in this case considering Plaintiff's incessant demand for and consumption of judicial resources over the past seventeen years and her obvious lack of respect for he judicial process, which is abundantly evident from her pleadings. See, e.g., [you guessed it, *Mack*]."

All that was missing was the asterisked attribution to Judge Easterbrook, who then became impatient with the progression of that appeal and so sanctioned her in the fee-challenge case on a trumped up charge. He was hell-bent on sanctioning Mann. The case and grounds were fungible.

Thus Mann's cryptic reference above to a judicial vendetta. He is engaging in common thuggery cloaked in the judicial office, and Mann sees little difference between his conduct and that for which District Judge John H. McBryde famously (within legal circles) was sanctioned, other than the chasm in social status between the two judges – among those who matter. See *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52 (2001).

That court recently issued an opinion in which Judge Andersen's denial of a Rule 11 motion was an issue. The

opinion, in *IDS Life Ins. Co. v. Royal Alliance Assoc.* No. 00-2009 (7th Cir., Sept. 12, 2001), written by Judge Richard Posner, reverses the denial of a sanctions motion and quotes at length from a transcript of a hearing in which Judge Andersen says he is philosophically opposed to sanctions. Judge Easterbrook also was a member of the panel. The opinion says the case was argued on January 23, 2001 – two days before Judge Easterbrook reassigned Mann's case from Judge Andersen to Judge Murphy.

Also a few days before January 23, Mann filed a motion in the appeals in *this* case, in which briefing had completed nearly a year earlier. Her motion, titled "Motion for Assignment to a Three-Judge Panel," read in part:

> Briefing in these appeals was concluded nearly a year ago and a docket entry dated March 3, 2000, indicates that the appeals have "been determined to proceed without oral argument .... About two weeks ago, Mann phoned this court's clerk's office and asked whether, since there would be no oral argument, she could learn the composition of the panel assigned to the appeals. She was told that there had been no assignment to a panel, that instead the appeals were assigned to a single judge – which seemed odd to her even by the standards (such as they are) that this court applies to *her* various appeals. (There have been several, all but this one concerning a single other lawsuit.) So she persuaded the clerk to check further. After checking, the clerk told her that the appeals indeed currently were assigned to a single (unidentified) judge but that eventually they would be assigned to a three-judge panel for resolution.

That motion remained pending – until after it became moot, specifically until September 5, when none other than Judge Easterbrook issued an order that cutely read. "ORDER re: Motion for Assignment to a Three-Judge Panel. On August 31, 2001, a three-judge panel decided these appeals. Thus, the requested relief has already been provided. The motion will be filed without further judicial action." And

indeed it had been assigned to a three-judge panel, according to the August 31 order on August 15, or at least that was the date on which it was "submitted" without oral argument. That was, perhaps not coincidentally, one day after the Illinois appellate court denied Mann's rehearing petition on the opinion in the products-liability case on which the federal court's August 31 order relied so heavily for support in issuing the rule to show cause. The federal appeals panel seems to have known about that ruling before Mann did; Mann didn't; receive notice of it until a week later, in an envelope postmarked August 21.

And should anyone miss her drift, Mann believes there was collusion between the two appellate panels, partly because she can discern no legitimate reason why the federal appeal could not be resolved until after the state-court appeal was resolved and therefore why it remained pending without oral argument for eighteen months after completion of briefing. And partly because both opinions were so replete with errors of fact, the errors in the state-court opinion jibing uncannily with the thrust of the federal-court opinion. And partly because (as disclosed in the aforementioned gossip column, App. Q.) Judge Rovner is a close friend not only of Judge Flaum's wife, Delilah Brummet Flaum (an irrelevant fact here), but also of Illinois Appellate Justice Anne M. Burke (a highly relevant fact here because Justice Burke wrote the opinion in Mann's case). Justice Burke, incidentally, is the wife of attorney and veteran Chicago alderman and Daley ally Edward Burke, who for decades has chaired the City Counsel Finance Committee.

Mann has concluded that the famous Six Degrees of Separation theory of personal relationships is off by at least three degrees, judging from Chicago legal circles.

## SUMMARY OF ARGUMENT

Mann suffers from the delusion that the orders issued and the sanctions imposed and the circumstances under which they were imposed; i.e. the utter absence of any semblance of due process, speak so clearly for themselves that she need not

reiterate why this writ should be granted. Which is why she has left herself so little space in which to argue (beyond all of the above) that it should be. She has, in other words, already presented her arguments. But a few points do need additional emphasis and she uses her final page to emphasize them.

## REASONS WHY THE WRIT SHOULD BE GRANTED

First, when an appeals court acts on a matter, any matter, in the first instance, even when the issues are briefed, the adjudication process is truncated significantly, increasing the likelihood of error, at least of fact but also of law. The appeals court, then, is the court of both first and last instance – as there is no right to appellate review of an appellate ruling. It seems to Mann that if an appeals court is to be the one and only court to rule on an issue, it should not eliminate the adjudication process completely, as it did here, creating out of thin air the grounds upon which it rules and apprising the losing party of those grounds only after the fact.

The case-or-controversy requirement for Art. III jurisdiction – the requirement of ripeness, etc., etc. – is founded in the recognition that absent a genuine adversarial process the likelihood of judicial error is significantly increased. And presumably, the right to a genuine adjudicative process is not limited to litigants who by the grace of the appeals court will see their appeal designated as precedent – or, in the code of the writer of *Hart v. Massanari*, No. 99-56472 (9th Cir. Sept. 9, 2001) – worthy of such designation, and in the code of the writer of this petition worthy of application of the actual law rather than of some one-shot departure from it; the claim in *Hart* is transparently silly that because appeals courts "must follow the law" when issuing uncitable opinions they *do* follow the law when issuing uncitable opinions, even though there is no reason not to allow an opinion to be cited *other than* that it constitutes a one-time departure from settled law.

"Today, of course, we would consider it unfair – probably unconstitutional – to allow juries to make up the law as they

go along," that judge writes, as if today we consider it fair for appellate courts to make up the law for but a single case. As if today we consider it fair to impose a severe sanction on the basis of a fleeting rule of law, such as the temporary redefinition of "unreasonable and vexatious," or the abrogation of procedural due process, or the introduction in America of the :British "loser pays" rule – not in America generally, just in Chicago, just temporarily. Or all of these, just briefly. See *Teague v. Lane*, 489 U.S. 288 (1989).

This Court's mandate in *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), and in *Roadway Exp., Inc. v. Piper*, 447 U.S. 752 (1980), is clear: the procedural safeguards of notice, and an opportunity to respond, and an actual evidentiary hearing (unless the sanctioning judge(s) witnessed the conduct at issue) are prerequisites to the imposition of a sanction. Yet the appeals court in Mann's case didn't comply with it; it pretended instead that the mandate doesn't exist. And why not, when the mood strikes? There is nothing to actually force it to comply with that or any other mandate of law. This system of uncitable resolution of appeals is purely an honor system, and it is violated at will.

And two quick points: First, Mann asks this Court to resolve the issue that it left unresolved in *Lindsey v. Normet*, 405 U.S. 56 (1972): whether or not due process entitles litigants to appellate review.

Second, there is remarkably widespread confusion and diametric conflict among appellate judges, certainly in the 7th Circuit, regarding the breadth of the *Rooker-Feldman* doctrine. Judge Easterbrook's understanding of that doctrine as he delineated it in Mann's case and also in *Durgins*, supra., is vastly more encompassing than that of, say, Judge Posner as he has stated it in numerous opinions, e.g., – opinions upon which Mann relied and that she cited throughout this litigation. There is a real need for clarification from this Court.

Respectfully submitted,

Beverly Mann
Petitioner Pro Se

## APPENDIX

Please note: Because of time constraints I am including here only the first of the four orders from which I am appealing (App. A). The included order was issued on August 31, 2001. I also am including my response to that order (App. E), which I filed on September 19. I will file a supplemental appendix with the other orders and documents I identify in my petition as part of my appendix.

Thank you.

*2001 U.S. App. LEXIS 19829, **

BEVERLY B. MANN, Plaintiff-Appellant, v. DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY, ILLINOIS, Defendants-Appellees.

Nos. 99-1750 & 99-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2001 U.S. App. LEXIS 19829

August 15, 2001 *, Submitted

* After an examination of the briefs and the records, we have concluded that oral argument is unnecessary, and the appeals are submitted for decision. See Fed. R. App. P. 34(a); Cir. R. 34(f).

August 31, 2001, Decided

**NOTICE:** [*1] RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**PRIOR HISTORY:** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 98 C 8004. Harry D. Leinenweber, Judge.

**DISPOSITION:** Appeal No. 99-1750 dismissed as moot. On appeal No. 99-3595, the judgment of the district court vacated, and the case remanded with instructions to abstain. An order

to show cause entered, returnable within 14 days.

**COUNSEL:** BEVERLY B. MANN, Plaintiff - Appellant (99-1750, 99-3595), Pro se, Chicago, IL USA.

For COOK COUNTY, DOROTHY BROWN, Defendants - Appellees (99-1750, 99-3595): Mary D. Mallo, OFFICE OF THE STATE'S ATTORNEY OF COOK COUNTY, Chicago, IL USA.

**JUDGES:** Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

**OPINION: Order**

This is the culmination of an absurd, and absurdly protracted, effort by a lawyer who filed a tort suit in state court to litigate particular issues in federal court. Beverly Mann filed a products-liability suit against Upjohn Company. After dismissing that suit in [*2] 1992 to avoid the judge's order that she submit to discovery, Mann filed again in 1993, and again failed to provide information in discovery despite judicial orders requiring her to do so. Mann took the position that she alone would decide what information Upjohn received. Ensuing sanctions hampered her ability to present evidence at trial. Mann turned to federal court, asking for an order compelling the state court to grant a continuance. That quest was unavailing. When the case was called for trial in April 1998, Mann, a member of the bar representing herself, refused to proceed. The judge dismissed the suit for want of prosecution, and Mann appealed. Under 705 ILCS 105/27.2a(k)(4) she had to pay a record-preparation fee of $ 150 plus 25 [cents] for each page over 200. This was no more acceptable to Mann than the discovery rulings had been. She was willing to pay $ 150 for preparing the whole record (which weighed in at over 6,000 pages) but no more.

Supreme Court Rule 298 provides for full or partial waiver of

the fee for those who are unable to pay it. Mann, who concedes ability to pay, contends only that paying the fee would be a "hardship." Abjuring the means provided by state [*3] law for relief, Mann asked the judge in the state case to declare § 105/27.2a(k)(4) unconstitutional as a violation of the equal protection clause in the fourteenth amendment and as a "hidden tax" in violation of the state's constitution, Art. I § 12 of which provides for access to the courts. This provision reads: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Mann's theory is that the charge exceeds the cost of preparing the record, is deposited in the county treasury, and thus is a "tax" on litigation that abridges the right of access.

After the trial judge denied Mann's request for relief, she did not appeal within the state system. Instead she filed a federal suit (No. 98 C 6078) under 42 U.S.C. § 1983, making the same constitutional arguments that had been presented to the state trial judge. This was dismissed under the *Rooker-Feldman* doctrine after the district judge concluded that it was just a (poorly) disguised attack on the decision of the state trial judge. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923); [*4] *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Mann's next step was to file an original action in the Supreme Court of Illinois--seeking to invoke not Rule 298 (a request that should have been addressed to the trial or appellate courts) but Supreme Court Rule 381, which deals with challenges to revenue statutes. That court promptly denied Mann's request for leave to commence an original action. Mann also presented a new request to the trial judge in the products-liability case. That judge made it clear that the earlier decision had been, not on the merits, but procedural: The judge viewed Mann's motion as an inappropriate effort to convert the products-liability case into some new constitutional claim.

Mann could have appealed that decision within the state's hierarchy but did not. Instead she returned to federal court, first by filing a Rule 60(b) motion in No. 98 C 6078 and, after that failed, by commencing a few federal suit, which was docketed as No. 98 C 8004. (She did not appeal the final decision in No. 98 C 6078.) In this new proceeding--Mann's third federal suit arising out of a single state action--Mann [*5] demanded an injunction, a writ of prohibition, and other relief against the state's implementation of § 105/27.2a(k)(4). This suit could have been dismissed on preclusion grounds; a disappointed litigant must appeal rather than file another suit, even if developments after entry of the first judgment show that the decision was incorrect. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). But the defendants did not invoke the law of claim preclusion (res judicata). Instead they defended on the merits. The district judge concluded that the state judge's explanation lifted the *Rooker-Feldman* doctrine. Now, the federal judge believed, Mann was attacking § 105/27.2a(k)(4) itself rather than the state court's decision. (This is a doubtful proposition; Mann's only grievance is the state judicial system's application of § 105/27.2a(k)(4) to her appeal. But just as the Supreme Court avoided the *Rooker-Feldman* issue in *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987), we need not consider it here.) Nonetheless, this did Mann no good, because the district judge concluded [*6] that she is very unlikely to prevail on the merits and declined to afford interlocutory equitable relief. 1999 U.S. Dist. LEXIS 2804 (N.D. Ill. Mar. 2, 1999). Mann's appeal from this decision has been docketed as No. 99-1750.

While that appeal was being briefed, the district court dismissed Mann's complaint on the merits. 1999 U.S. Dist. LEXIS 13426 (N.D. Ill. Aug. 3, 1999). The court ruled that a fee for record preparation in an ordinary civil lawsuit is not subject to the special rules for criminal litigation by indigents, exemplified by cases such as *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), but is more like the filing fee in bankruptcy, see *United States v. Kras*, 409 U.S.

434, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1973). The Supreme Court held in *Kras* that a filing fee for bankruptcy is not unconstitutional even if set so high that some people cannot afford it; and if one can be too poor to go bankrupt, the district judge concluded, there is no possible constitutional objection to a fee in litigation that imposes a "hardship" on one who is able to pay. Mann's appeal from this decision has [*7] been docketed as No. 99-3595. Meanwhile the state appeal proceeded, and the judgment dismissing the suit has been affirmed. *Mann v. Upjohn Co.*, 2001 Ill. App. LEXIS 531 (1st Dist. June 29, 2001). Either Mann paid the fee under protest or the state court decided to overlook the nonpayment. In neither event is the federal case moot. If Mann paid, she could get the money back if she were to prevail; and if Mann did not pay, the state may dun her for the money, or the lack of payment may impede review by the Supreme Court of Illinois (or future appeals Mann may pursue, for she is a frequent filer).

Defendants contend that the district court's judgment on the merits moots appeal No. 99-1750. For her part, Mann insists that the district court lacked jurisdiction to adjudicate the merits while No. 99-1750 was pending. Mann's position is incorrect. Although an appeal usually deprives the district court of jurisdiction to proceed, an appeal under 28 U.S.C. § 1292(a)(1) from the denial of an interlocutory injunction is an exception to that norm. *See Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979); *Abramson v. University of Hawaii*, 594 F.2d 202 (9th Cir. 1979). [*8] So No. 99-1750 no longer matters, and that appeal is dismissed as moot. (Because the final judgment automatically supersedes the denial of interlocutory relief, it is unnecessary to vacate the earlier decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950).)

As for No. 99-3595: We decline the parties' request to reach the merits. This case has no business being in federal court and should have been dismissed immediately after its filing. One reason is the Tax Injunction Act, 28 U.S.C. § 1341. Mann characterizes the charge as a "tax," and if that is correct then §

1341 bars any federal interference if a plain and speedy remedy is available in state court. Supreme Court Rule 298 offers one such remedy; asking the state's court of appeals for relief from the charge is another. Mann pursued neither. If, however, the charge is not a "tax" (and it hardly seems like one; Mann does not contend that the congeries of fees charged to litigants, including all filing and record-preparation charges, is a net money-raiser for the state after all expenses of running the judicial system have been accounted for) then [*9] § 1341 does not apply--but much of Mann's substantive argument is sunk. So far as the federal Constitution is concerned, it makes no difference whether fees go into the state (or county) treasury, which then underwrites the judicial system, or instead are deposited into a separate fund under the control of the courts.

Whether the fee is a "tax" does not matter in the end, however, because the district court should have abstained. This suit is a replay of *Pennzoil*, in which Texaco, having suffered a large judgment at trial in a state court, asked a federal court for relief against the bond that state law required as a condition of appeal. Texaco contended that the bond would serve as an *absolute* bar to appeal under the circumstances, a more grievous injury than the "hardship" of which Mann complains, and the source of a better constitutional argument. See *Lindsey v. Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972). Still, the Supreme Court held, it would be inappropriate for a federal tribunal to interfere with ongoing state litigation. See, e.g., *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); 28 U.S.C. § 2283. [*10] Texaco had to present its constitutional arguments to the state judiciary, with the option to seek review in the Supreme Court under 28 U.S.C. § 1257. Mann should have proceeded in the same way. After the state's trial judge rejected her contention, she should have sought review within the state system and then, if necessary, by the Supreme Court of the United States. Instead she bolted to federal district court, which under *Pennzoil* can offer no relief.

Defendants have not sought abstention under *Younger* and *Pennzoil*, but federal courts are entitled to abstain on their own--not only to protect states from errors by their lawyers (the State's Attorney of Cook County, representing the defendants in this case, may not have the interests of the whole State at heart), and to avoid unnecessary decisions on constitutional questions, but also to protect themselves from impositions of the kind that Mann has perpetrated. See *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985). Mann contends that the fee violates the Constitution of Illinois as well as the Constitution of the United States. That argument, presented [*11] to a state court, could have avoided any need for federal decision, even by the Supreme Court on certiorari under § 1257. Moreover, the fact that the appeal in the state case has concluded does not lift the abstention doctrine; one may not avoid a state forum by waiting until its process has concluded. See *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995).

These proceedings not only imposed on the federal courts (and the defendants) but also appear to come within the scope of 28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Mann, an attorney, has multiplied these proceedings unreasonably and, in an objective sense, vexatiously. See *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985). The tort suit was filed, dismissed, refiled, and lasted for five more years before it was dismissed, on the date set for trial, because Mann [*12]

refused to participate. Proceedings were marred by Mann's failure to follow judicial orders concerning discovery and by her generally inappropriate conduct. The state's appellate court rebuked Mann for "inexcusable" abuse of opposing counsel as well as "lack of cooperation ... in obeying court orders, indifference to the trial court's advice and admonishments, repeated attempts to delay the proceedings, and a failure to follow the rules of proper procedure." The state portion of this litigation included, in addition to the main case (filed twice and unduly dragged out) and the original action in the Supreme Court of Illinois, repeated efforts to disqualify a judge. The federal portion has included the three suits we have mentioned plus additional motions to disqualify, requests for sanctions (Mann's motions were denied and she was ordered to pay $ 100 to the defendants under Fed. R. Civ. P. 11), and the two appeals from No. 98 C 8004 plus post-judgment motions practice in No. 98 C 6078. One suit has been turned into six, each characterized by needless contretemps.

We therefore direct Mann to show cause, if any she has, why she should not be ordered "to satisfy personally the excess [*13] costs, expenses, and attorneys' fees reasonably incurred because of such conduct." We limit this order to costs and expenses the defendants have incurred in the federal portion of the litigation. Mann may file her response within 14 days. Within the same time, defendants should file with the court an estimate of the total expenses they have incurred in both the district court and this court. This should include an estimate of the market value of the services provided by their in-house legal staffs. See *Central States Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996).

Appeal No. 99-1750 is dismissed as moot. On appeal No. 99-3595, the judgment of the district court is vacated, and the case is remanded with instructions to abstain. An order to show cause will be entered, returnable within 14 days.

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In the
United States Court of Appeals
For the Seventh Circuit

| | |
|---|---|
| In re: Beverly B. Mann | ) |
| | ) |
| Nos. 99-1750 and 99-3595 | ) |

**(Corrected) Response to Rule to Show Cause**

This court has issued a Rule to Show Cause why I should not be ordered "to satisfy personally the excess costs, expenses, and attorneys' fees incurred because of" the conduct the court alleges in its Rule 53 Order. Much of that conduct allegedly occurred in my underlying state-court products liability lawsuit, which stemmed from my use of the prescription drug Halcion, manufactured and marketed by The Upjohn Company, the defendant in that litigation.

But the Rule 53 Order's summary of procedural rulings and events in the underlying state-court lawsuit contains numerous significant factual inaccuracies. E.g., I did not file the initial products-liability lawsuit in federal district court; Upjohn removed it there. And the lawsuit was voluntarily dismissed in federal court upon motion by my attorney at the time, Paul R. O'Malley, for reasons utterly unrelated to discovery: O'Malley wanted to add a defendant, my prescribing physician, whose joinder would destroy federal diversity jurisdiction and allow the case to be heard in state court where he wanted it heard. The dismissal order itself explicitly provided for leave to refile in state court within 60 days adding the physician as a defendant.

Discovery was not a controversy at that early stage, much less the reason for the voluntary dismissal. Nor was I

ever barred as a discovery sanction from presenting any particular evidence, nor ever threatened by the court with a discovery sanction of any type.

I won't even bother to point out that under 28 U.S.C. §451, the term "court of the United States" as used in §1927 refers only to federal court, not to state court, and that §1927 doesn't authorize a federal court to impose sanctions based in part on events (even real ones) that occurred in state-court litigation. Not even when the federal court liquefies the two lawsuits into one for purposes of dismissing the federal case.

But I do recommend the issuance of a Miranda-type warning, something like: Every-thing you say or that someone says about you in state court can and will be used against you in a federal appeals-court of law. In the 7th U.S. Circuit appeals court, anyway.

Some of this court's inaccuracies about the underlying case are adopted or construed (and in two important respects misconstrued) from the state appellate court's still-unofficial opinion,[1] which itself contains numerous misrepresentations about the contents of certain court orders and about certain other procedural events. These are distortions so stark that they approach outright fabrication; e.g., certain motions that the opinion implies were granted actually were denied (and the reverse), and the opinion represents specific judicial findings as directly contrary to actual statements in written memorandum orders.

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[1] I filed an affidavit with the appellate court advising that I plan to file a petition with the Illinois Supreme Court pursuant to Supreme Court Rules 317 and 315. There are several points, but what entitles me to review as a matter of right under Rule 317 is that the appellate court failed to review the merits of the summary judgments entered on three counts well before the remaining counts were dismissed for want of prosecution, the propriety of which implicates due process and equal protection guarantees. I attach a copy of the 20-page Petition as Exhibit 1.

An easily illustrated example is the opinion's statement that "[o]n January 28, defendant filed a motion to have facts deemed admitted based on plaintiff's failure to answer defendant's request for admissions." Indeed Upjohn did file such a motion, but the motion was denied because it was established that due to an error by a substitute secretary during Christmas week, Upjohn's lawyers didn't serve me with a copy of the request and I didn't know of it until I received notice of the motion; the substitute secretary to the attorney responsible for mailing copies of *several* documents that were filed on December 27 had failed to include in the envelope a copy of the request for admissions.

The envelope did include a summary judgment motion, to which I responded *before* Upjohn filed its motion on the request for admissions, and a large set of interrogatories (Upjohn's eighth set, I believe, after several were stricken upon my motion), to which I also had responded – by answering some of them and *successfully* objecting to others – before Upjohn filed its admissions-motion. After Upjohn's admissions-motion was denied, I promptly filed a blanket objection to the entire request. The objection was *sustained* and the request, like several earlier ones, was stricken.

The incident was irrelevant to the appeal and was included in the opinion solely to mislead that the motion was granted rather than denied.[2] *Both* parties in that lawsuit timely objected to various discovery demands. Neither party's

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[2] This court plays a similar game, e.g., in its throwaway reference to the $100 sanction Judge Leinenweber imposed, the unelaborated mention of which misleads that the sanction concerned the substance of the lawsuit and that it was imposed after the issuance of the Rule's required formal notice and opportunity to respond in writing, and that it was justified. But I had *appealed* from the sanction order, which (if only in theory) barred this court from presuming without examination that it was appropriately issued.

discovery objections were ever ruled frivolous. In 1996 and '97, I moved *successfully* to strike one after another after another set of interrogatories/requests for admissions – each set containing approximately 200 interrogatories and a very substantial number of generic requests for admissions, which Upjohn served routinely in Halcion litigation. My *sustained* objections: that these discovery requests were redundant of earlier-completed discovery, that they were vexatious, and that they were served in violation of an Illinois Supreme Court Rule limiting the number of interrogatories to 35 without leave of court. I also moved *successfully* to quash several subpoenas (including one seeking a copy of my law school records, which I learned of only when an attorney for the University phoned me and asked whether I wanted the school to contest the subpoena on my behalf and on the school's.)[3] Upjohn wanted to depose everyone I had ever known (well, there *were* a few of my former kindergarten classmates whose

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[3] Another of the subpoenas was for the deposition of my sister's former husband, a gynecologist who after graduating from Northwestern University Medical School in 1969 moved with my sister to Denver, where he completed his medical training. He has never practiced medicine anywhere but Denver, and I have never lived in Colorado, yet Upjohn said it needed his deposition because I might have seen him as a patient. I had not claimed gynecological injury from my use of Halcion, nor do I have a medical history of gynecological problems. My sister and her former husband, incidentally, were divorced in 1975, and she and her current husband have lived in Seattle since 1987. Suffice it to say I easily had her ex-husband's subpoena quashed – as I did a deposition subpoena served on her current husband, who has never lived in Chicago, and a deposition subpoena served on my other sister's husband, who has lived (with my sister) in Houston since 1983.

As for the subpoena for my law school records, the notice of it was sent to O'Malley's office, but O'Malley didn't know about it because (incredibly, in my view) neither he nor his associate routinely reviewed subpoena notices; the office receptionist was instructed simply to place those notices in the appropriate case file upon their receipt. It was this incident, in June 1996, that caused my already strained relationship with him to sever.

names did not appear on their deposition list). And in August 1997, I moved successfully to quash a mass effort by Upjohn to secure via *written* "evidence deposition" the testimony of virtually every physician I had ever seen; it wasn't quite clear how, exactly, I was to attend the *written* evidence depositions.[4]

The federal judge's voluntary-dismissal order had required that I respond within a specified time (14 days, I think) to a lengthy set of interrogatories Upjohn had served upon me shortly before the dismissal. I happened to be out of town at the time, and O'Malley faxed me the interrogatories, which I answered and then Fed Ex'd back to him. (The notary's stamp on my answers read "King County, WA.") Yet no sooner was the lawsuit refiled than did Upjohn's lawyers serve me with another lengthy set of interrogatories. O'Malley objected on the grounds that they were almost entirely duplicative of the ones I already had answered. The objection was not sustained, I was ordered to answer the interrogatories, and I did. No sanction of any type was issued then, or – I reemphasize – at any other time in that litigation.

No, most of the controversy in that litigation – and the one that ultimately caused me to request that the case be dismissed for want of prosecution – concerned not any failure to provide information in discovery but my failure to *retain paid opinion witnesses*, which I maintained I did not need in

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[4] "Evidence deposition" is a term of art, and something of a misnomer, in Illinois law. It differs from a discovery deposition (a *non*-evidence deposition?) in that its supposedly sole purpose is as verbatim trial testimony and, with limited exceptions, objections not made during an evidence deposition are deemed waived at trial. Discovery depositions, by contrast, under Illinois law cannot be used as verbatim trial testimony. Evidence depositions are allowed only by court order, the grounds for which must be the anticipated unavailability of the witness at trial, a circumstance that Upjohn did not (and *could* not) claim regarding even a single one of the targeted deponents. And for obvious reasons, there is no rule in Illinois permitting *written* evidence depositions.

order to prove my case. The controversy, in other words, was not about my failure to *disclose* witness's identities or to produce documents but about my failure to *pay* opinion witnesses.

That was it, pure and simple. And should this court doubt this, I am providing in an accompanying appendix a copy of the Table of Contents and the Points and Authorities table from my opening brief in that appeal. And I can provide on disk or in hard copy all four briefs filed in that appeal, if this court would like.

The *paid*-opinion-witnesses issue also was the subject – the *only* subject – of the petition for temporary restraining order I filed in federal court in October, 1997, that so enrages this court.

It also was a central part of my appeal, although as is so typical of appellate opinions the state-court opinion doesn't mention it. Instead it cites a litany of allegations and presents them inaccurately as sustained by the trial court, apparently on the legal premise that any accusation a defendant makes against a pro se plaintiff is by definition accurate, at least when removed from its context (as most of the enumerated items are). But almost none of the items was addressed in the briefs to that court, and since the court knew of the allegations it also knew (or should have known) of my responses to them, and of the trial court's determinations concerning the allegations, and of the reasons for the trial court's determinations, none of which buttressed the opinion's premise.

For example, the court utterly misrepresented the nature and significance of one ruling by writing, "On February 19, the trial court granted defendant's motion to bar fact witnesses." The intended inference, of course, was that *all* my fact witnesses were stricken. But that is nonsense. The motion was a typical pretrial motion seeking to bar certain named trial witnesses. I no longer recall the details, but *by no*

*means all* of my fact witnesses were stricken; I think only two of them were. And I had some of Upjohn's witnesses stricken, too.

In *most* litigation about to proceed to trial, names of witnesses are stricken on pretrial motion. So, the hell, what? This wasn't an issue on appeal and therefore was not addressed in the briefs. The court mentioned the February 19 order because it wanted to mislead; an honest recounting of it, as with an honest recounting of so much else in that case, would have been pointless or, worse, self-defeating.

That court perverts into parody the legal construct that appellate courts can affirm upon any grounds found in the record. As does this court, it redefines the phrase "grounds found in the record" as any statement that appears in any document in the record, however unsupported and even if overtly rejected by the trial court. It designates the defendant's lawyers as factfinder, as the lawsuit's diarist, as the font of true observation, and whatever they write may properly be adopted, unexamined, by the court.

And any sentence in a court order can be extracted, in or out of its context, and adopted unscrutinized and without elaboration, as needed. This court knows the routine: The trial court entered summary judgment/a sanction order/a discovery order/a … order; therefore the summary judgment/the sanction order/the discovery order/the … order is affirmed."

Or: The trial court entered summary judgment/a sanction order/a discovery order/a … order; therefore an order that *piggybacked on* the summary judgment/the sanction order/the discovery order/the … order is affirmed.

No need to examine the truth of the allegation or the propriety of the foundational order even when it is being appealed.

I call it a house-of-cards, although in criminal-law lingo I think it's known as a Ponzi scheme.

Most astonishing about the state-court opinion is the extraordinary degree to which that court freelanced through the huge (and expensively prepared) court record, recasting utter irrelevancies in a starkly false light.[5] I address some additional instances in detail in Exhibit 1, attached.

But of more immediate importance is that *this* appeals court in its Rule 53 Order makes several key errors, particularly concerning Illinois law regarding: (1) the *appealability* of two orders (which this court erroneously calls judgments) entered in the state-court case respectively on September 28 and November 19, 1998, on the file-preparation-fee matter; (2) whether under Illinois law my fees-challenge lawsuit and the underlying products-liability one really are the same case and therefore a replay of *Pennzoil v. Texaco*; (3) whether Illinois appellate courts have the authority to waive or reduce the file-preparation fee; (4) the effect of a denial by the Illinois Supreme Court of a Rule 381 petition, and the resulting effect on the issue of comity; and (5) the constitutional structure in Illinois for *funding* the county and appellate courts.

This court also misconstrues the nature of my federal constitutional challenge. I think that in part this is because the court misapprehends Illinois' constitutionally-determined funding structure for the courts; the graduated ceilingless fees are paid *not* to the state, although it is the state *alone* that funds the trial and appellate court systems, but to the counties, which fund *no part* of the court systems. And in part it is because no judge or court-staff member read my briefs – which, incidentally, did address the funding-structure

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[5] I include in the appendix my two three-page motions concerning the attorney-eye-surgery incident that that court calls inexcusable. This court can, if it wishes, read the motions and draw its own conclusion.

question. (Had the Rule 53 Order's author read my briefs he would know, for example, that I did pay the $1,635 record-preparation fee – not to the state but to the county, as per the law I was challenging. Although the state alone funds the courts it plays no role whatsoever in the collection *or use* of the fees, a primary basis for my lawsuit. So much for this court's contention that the Cook County State's Attorney's office failed to assert certain defenses because it did not have the interests of the *state* at heart; the state *had* no interest at heart, but the county did.)

Instead, a law clerk was assigned to summarize my arguments as filtered through the *appellees'* briefs, as is standard procedure for appellate review, or faux appellate review, in pro se civil lawsuits. A foolproof strategy for an appellee contesting a pro se appeal is to not even mention the appellant's strongest arguments; it works every time.

Or so, as a frequent filer, is appears to me.

## I. The Fee-Challenge Lawsuit

This court misunderstands the essential premise of my federal lawsuit, which is that a graduated, ceilingless appellate fee determined by the size of the court record irrespective of the relevance of most of the record to the issues being appealed, and paid *not* to the state (which *alone* funds the county court systems in Illinois) but instead to the county itself (which pays *nothing* toward the cost of running the court system), irrationally requires appellants whose court files are large to pay unduly to support the *county* government albeit *not* the state government and therefore *not* the trial or appellate court system.

**A. Under Illinois law, the September 28 and November 19, 1998, state-court orders on the fee challenge were not appealable.**

This court derides my claim that the September 28 and November 19, 1998, orders issued by Cook County Circuit Judge Susan Zwick were not final orders with res judicata effect. Deride though it might, this court presumes incorrectly; under Illinois law those orders were not appealable and they had no legal effect other than to bar the fee-challenge from being litigated as part of the products-liability lawsuit.

This court attributes to Judge Zwick its own view, which ridicules my fee-challenge motions as an inappropriate effort to convert the products-liability case into some new constitutional claim. Ridicule though it does, the court misconstrues the nature of Judge Zwick's orders as determined by Illinois law. Zwick found my motions inappropriate not because they asserted a constitutional challenge to the record-preparation fee for appeal in the products-liability lawsuit but because under Illinois law the constitutional challenge could be brought *only in a separate lawsuit*. And under Illinois law, as long as there exists the option to file a separate lawsuit, such orders *are not appealable*. See, e.g., by analogy, *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, N.E.2d 338 (1998), holding that orders denying motions to vacate dismissals for want of prosecution are not appealable as long as the plaintiff could refile within one year under 735 ILCS 5/13-217.

The motion I presented at the September 28 hearing was to compel the release of the already-prepared record on appeal. It invoked specific provisions of the Illinois state constitution but not the United States Constitution. Judge Zwick expressly *declined to consider* the constitutional challenge to the statutory subsection at issue, 705 ILCS

105/27.2a(k)(4). *She said I would have to file another lawsuit in order to challenge the constitutionality of the fees statute.* She also said she knew of no statute or Supreme Court Rule other than Rule 298 that would allow her to compel the release of the record without the payment of the preparation fee. As per normal procedure there, I drafted the order. I wrote that the motion was denied.

At the November 20 hearing, the motion I presented to Zwick requested the severance of portions of the record for preparation for appeal. The motion sought alternatively a finding that the fees statute violates three provisions of the Illinois state constitution. That motion, like the earlier one, included no federal constitutional claim.

But it did include a section titled "The Procedural and Jurisdictional Basis for this Motion," which read:

> As Mann understands it, there are essentially two methods by which the constitutionality of a statute may be challenged. Anyone with legal standing to challenge the statute (i.e., anyone in reasonably imminent danger of suffering harm because of the statute) may do so by filing an independent proceeding with a court; e.g., a petition for mandamus or prohibition. If the statute pertains to litigation, persons who are litigants in a proceeding effected by the statute may also file a motion seeking relief from compliance with the statute via a finding that the statute is unconstitutional.
>
> It was the latter method that was employed recently to obtain a court ruling finding particular sections of the Illinois Tort immunity Act, and ultimately the Act itself, unconstitutional. To wit: *Kunkel v. Walton, et al.*, No. 81176 (Nov. 20, 1997); *Best v. Taylor Machine Works*, Nos. 81890, 81891, 81892, 81893 cons. (Dec. 18, 1997); *Hettinger v. Krah*, 95 L 601(not a Cook County case)....

> .... In *Kunkel, supra.*, and *Hettinger, supra.*, for example, the plaintiff filed a personal injury lawsuit and then challenged the section of the Tort Reform Act requiring the plaintiff to allow the defendant indiscriminate access to the respective plaintiff's lifetime medical records without regard to their relevance to their lawsuit, upon sanction of dismissal of the lawsuit. The plaintiffs each challenged the constitutionality of the statute, not collaterally in a different court proceeding but directly in motions brought within their respective underlying lawsuits.
>
> The ultimate relief they sought was the ability to proceed with their lawsuits without complying with the statutory mandate that they waive all rights to medical privacy. The avenue by which they obtained such relief: a finding by the court (the circuit court, affirmed on appeal) that the statute at issue violated Article I, Section 2, of the Constitution of the State of Illinois. The court declared the statute unconstitutional, thus granting them the ultimate relief they sought; they were allowed to proceed with their lawsuits without indiscriminately waiving their medical privacy rights.
>
> In *Kunkel* and *Hettinger*, the plaintiffs could obtain the ultimate relief they sought simply by a single action of the court. Once the court found the challenged statute unconstitutional, the court allowed the lawsuits to proceed without the statutorily mandated waivers.

The judge *agreed* with my premise. She read aloud a paragraph from an Illinois Supreme Court opinion (I think it was from *Kunkel*) which said the trial judge has the discretionary authority to exercise jurisdiction to hear constitutional issues collateral to the litigation. She said she was exercising her discretionary authority to decline to

exercise jurisdiction to hear the constitutional challenge, partly because the County was not a defendant in the products-liability case. (Their counsel did appear at the hearing, but only because I had requested her presence.) Again the judge told me to "file another motion." She also said I had misconstrued her earlier ruling when I drafted the September 28 order: She had not denied the constitutional challenge; she simply had declined to exercise jurisdiction to hear it. And she denied my request for severance of portions of the record. She dictated the precise language for the order, which reads:

1. The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.
2. The motion to remove documents from the record is denied on the basis that the court lacks the authority to allow it.

Her two orders, as they concerned the constitutional challenges, were similar in nature to ones that sever some counts in a complaint or that deny a discretionary joinder motion, orders that are non-appealable, at least under Illinois law, as long as no substantive rights are affected. Orders that, even if appealable, *are not judgments* and do not bar the litigation of the issues in a separate lawsuit if that is the choice of the litigant.

*Judge Zwick neither intentionally nor inadvertently precluded my right to litigate the issue.* She just denied me the forum of the products liability case in which to litigate it. By reading from (I think) *Kunkel*, she said she *could* have exercised jurisdiction to hear the matter but that she *chose* not to. She never suggested that she thought I was making an inappropriate effort to convert the products-liability case into some new constitutional claim. She said I *had* a constitutional claim, *stemming* from my appeal in the products-liability

lawsuit, but that she would not hear the claim as *part* of the products-liability lawsuit although she *could* if she chose.

This court, citing *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), writes, "This suit could have been dismissed on preclusion grounds; a disappointed litigant must appeal, rather than file another suit, even if developments after entry of the first judgment show that the decision was incorrect."

But under Illinois law *there was no judgment* – none whatsoever. There was only an order declining to accept jurisdiction to hear the fee-challenge as part of the products-liability case. This court's citation to *Moitie* follows immediately the court's reference to my Rule 60(b) motion in 98 C 6078, and I'm not sure whether the *Moitie* citation is intended as a res judicata finding on the dismissal of 98 C 6078 as well as on Judge Zwick's orders. But 98 C 6078 was dismissed not on the merits but on jurisdictional grounds that no longer existed by the time I filed 98 C 8004, and *Moitie* finds a res judicata bar only to the refiling of a claim already decided on its substantive merits. *Moitie* barred only my relitigation of the jurisdictional issue on which the district judge based the judgment in 98 C 6078, and I was not trying to relitigate that issue, which no longer was relevant.

This court's Rule 53 Order puzzles me with its citation to *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985), to support its sneer that "federal courts are entitled to abstain on their own … to protect themselves from impositions of the kind that Mann has perpetrated." Nearly every paragraph of *Mazanec* undermines this court's premise.

For example, *Mazanec* treated as a threshold question the appealability of an abstention order in the jurisdiction where it was issued. And after noting that in this circuit (where the abstention order was issued in that case), orders granting abstention are appealable as final orders and orders

denying abstention before final judgment are not appealable, that opinion commented that the latter are no more final than are orders denying motions to dismiss under Fed. R. Civ. P. 12(b)(6).

In my case, Zwick's abstention orders were no more final than was the order at issue *S.C. Vaughan Oil Co.* I know of no Illinois legal authority that suggests otherwise.

If this court does, it should cite to me that authority and allow me to address it before I am sanctioned for litigating the fees issue in federal court. I did discuss in the federal litigation the question of issue-preclusion, in the documents I filed with the district court (see the first paragraph of Section C below) and in my appellate briefs.

I did not ignore the issue; this court ignored what I wrote about it.

This court chides the State's Attorney's office and Judge Leinenweber as well as me for our collective failure to see an issue-preclusion bar. But the State's Attorney's office is familiar with "the preclusive effect of an Illinois state court judgment" and with what "that state's res judicata requirements" are, see *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285 (1992), as is Judge Leinenweber, a former Illinois state legislator and chair of a legislative committee that drafted Illinois' completely revamped civil practice statutory scheme in 1982. As was I in the fall of 1998, when I litigated the matter.

Which is why none of us found Judge Zwick's September 28 order as amended by her November 19 order, nor her November 19 order itself, a judgment with res judicata effect under Illinois law. Or under Illinois law a judgment at all.

**B. This court holds inexplicably that Art. III standing to challenge the constitutionality of a state court-fees statute itself bars a federal constitutional challenge in federal court, an untenable and circular legal position.**

This court also questions Judge Leinenweber' s belief that I was challenging the constitutionality of the fee statute itself rather than the state judicial system's application of the statute to my appeal. But this court appears to base its conclusion on this point solely upon my Art. III standing to challenge the fee statute, an untenable and circular legal position.

In my brief in 99-3595 at p. 4, I wrote, "The statute applies to all types of cases, including criminal, dissolution of marriage, child custody, adoption and probate, as well as to personnel injury and products liability lawsuits." I had written the same in my brief in 99-1750 and in most of the documents I filed with the district court.

And in my brief in 99-3595 at pp. 30-31, I wrote in a section titled "The Public Has a Strong Interest in Providing Access to Appellate Review Irrespective of a Party's Financial Ability to Pay a Four-Figure Tax":

> The public has a substantial interest in the ultimate determination of the constitutional issues presented in this lawsuit. As Mann noted above, the fees schedule at issue applies in every type of litigation in Illinois state court, civil and criminal. Mann does not challenge the district court's premise that litigants must be prepared to pay the reasonable expenses of litigation. She does challenge the constitutionality of a statute that requires litigants to pay litigation expenses that are neither reasonable nor inherently necessary but, rather, artificially erected by the government.

> Civil litigation is almost always very expensive. Hourly attorneys' fees have a market rate set mainly by large corporate clients and are virtually always in the three-figure-per-hour range. Court reporter fees also are substantial; court reporters attend approximately two years of school to gain the special skills that enable them to perform their service and then must purchase the very expensive equipment and (these days) computer software necessary to their job, and their fees reflect this. These are non-artificial (if not always reasonable) expenses of litigation.
>
> But the district court's premise is preposterous that this justifies the government's assessment of the artificial fees at issue in this lawsuit.
>
> Mann also believes that the fees schedule creates and inherent conflict of interest for attorneys representing clients upon a contingent-fee arrangement. In such circumstances, the attorney usually has agreed to pay the expenses of the litigation during its pendency and to deduct those expenses from the eventual monetary reward, if any. It seems likely to Mann that the prospect of a prerequisite court-fees payment of perhaps thousands of dollars may impact upon the advice the attorney gives the client regarding the advisability of appeal.

Having silently conceded the inevitability of a chasm between the actual stated grounds in a pro se civil appeal and what (after translation by a law clerk) passes as the court's summary of it, this type of thing no longer jolts me; I expect it of the court, and the court doesn't disappoint.

But the threat or imposition of sanctions (and certainly of sever ones, as this court plans to impose on me) are another matter entirely. Particularly so given that this court apparently bases its sanctions assessment partly on my standing to

challenge the fee statute – not on my lack of it but on my possession of it.

The court says (as I understand it) that standing to challenge the fee statute operates as a nearly irrebuttable presumption that the constitutional challenge concerns the statute's application only to that plaintiff's underlying case. Only if the plaintiff must pay the fee in order to appeal from an already issued judgment does she have standing under Art. III to challenge the fee's constitutionality. And because she is challenging the fee's constitutionality by virtue of the assessment of the fee in her appeal, she is presumed to be challenging its constitutionality only as applied in her case.

The presumption can be rebutted (presumably) only by filing a petition for class certification. But I lacked the funding and the legal expertise to litigate a class action. So according to this court I was not challenging the statute's constitutionality but only its constitutionality in my situation.

No matter that a finding of unconstitutionality in my situation effectively would have stricken the statute *in all situations*, just as occurred in *Kunkel* and *Taylor Machine Works*. It was not the nature of my claim but my failure to seek class status for it that bars my access to federal court and that subjects me to sanctions for proceeding with the matter in federal court.

How absurd.

The fee statute is neither vague nor susceptible of varying interpretations depending upon the circumstances – even less so, in fact, than was the statute in *Mazanec*. If the fee statute was unconstitutional in my case it was unconstitutional – period. Which is exactly what I argued to the district court and to this court, e.g., at pp. 26-27 of my brief in 99-3595, where I wrote:

> Because Cook County reaps a substantial monetary windfall as a result of §105/27.2a(k)(4), the subsection is, by definition, a general-revenue tax upon what is a very small subgroup of county residents: appellants in cases in which there is a large court record. No legitimate governmental purpose exists for the levy of this general revenue tax.
>
> For Mann, this statute has required her to pay approximately $1,400 (the amount of her payment beyond the approximate cost to the county of the preparation of her court record for appeal) to support the general expenses of county government. There is no connection between the requirement of this payment and any legitimate justification for it.
>
> The basis for this constitutional challenge obviously does not rest upon the financial resources of the appellant; it is equally available to any appellant whose court record is large, irrespective of the litigant's net worth, whether a homeless person living on the curbside of lower Wacker Drive, or Beverly Mann, or Abra Rockefeller Prentice.

Nor, incidentally, did I arbitrarily select the $150 that the court says I was willing to pay, but no more. The $150 amount was selected for me; it's the initial amount that pursuant to another subsection of the statute must be paid. The subsection I was challenging kicks in as a per-page ceilingless fee if the court file is larger than 200 pages. I challenged that subsection but not the one that assesses the $150 fee. Had the latter subsection assessed a $250 fee or $500 fee or even a $750 fee, I'd have paid it. But no more.

### C. Under Illinois law, my federal lawsuit and the underlying one are not the same case and therefore not a replay of *Pennzoil v. Texaco*.

In my amended complaint and mandamus petition, I quoted the following from *Retired Chicago Police Assn. v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993):

> To assess the preclusive effect of an Illinois state court judgment, therefore, we must apply that state's res judicata requirements. Under Illinois law, an action is barred by res judicata when there exists: "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies." *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 602 N.E.2d 820, 825, 176 Ill. Dec. 874 (Ill. 1992); see also *Welch v. Johnson*, 907 F.2d 714, 720 (7th Cir. 1990) (stating same).

Irrespective of whether this court agrees with me that Judge Zwick's September 28 and November 19 orders were similar to ones that sever some counts in a complaint or that deny a discretionary joinder motion and that they therefore did not bar litigation of the fees issue in a separate lawsuit, and setting aside the matter of identity of causes of action between the products-liability lawsuit and the fees-challenge lawsuit, it is indisputable that there existed no identity of parties or their privies in the federal and state-court actions.

Nor does this present a merely technical, and therefore perhaps insufficient, distinction between my cases and *Pennzoil v. Texaco*, the case this court finds determinative. The bond at issue in *Pennzoil*, and the statute that required its payment, were solely for the benefit of Pennzoil, not for the benefit of the government entity to which the bond would be paid. The bond money represented the monetary judgment that was to be appealed, and the government entity would hold the bond money in escrow *solely for the benefit of Pennzoil*, which had won the judgment.

It is no artifice to note that the petitioner to the Supreme Court in *Pennzoil* was, well, Pennzoil, not the government entity to which the bond was to be paid. The government entity was neither a party nor a party-in-interest to that proceeding; it had no financial or other interest in the outcome of the Supreme Court case. Indeed the *Pennzoil* opinion begins:

The principal issue in this case is whether a federal district court lawfully may enjoin a plaintiff who has prevailed in a trial in state court *from executing the judgment in its favor* pending appeal of that judgment to a state appellate court.

The issue in *Pennzoil* concerned the procedure for executing the monetary judgment awarded *to Pennzoil* at trial, specifically whether the procedure for executing the judgment implicated a federal constitutional right. But in my fees-challenge case the real party-in-interest was not Upjohn, the appellee in the products-liability case, but Cook County, the government entity that not only would collect the fee but would *use* the fee. And *did* use the fee; the county has not paid and will not be paying Upjohn the $1,635 I paid to it for the preparation of the court record.

So how is this a replay of *Pennzoil*? And, more to the immediate point, why should I be sanctioned in light of *Pennzoil* for filing the federal lawsuit? Other than that this court likes to sanction people for the sake of sanctioning people, that is.

As for Judge Zwick, she was right (for once) in ruling against me. (She was right *all* the time when she ruled *for* me.) I had relied upon *Kunkel*, *Taylor Machine Works* and *Hettinger* for my proposition that she did have jurisdiction to hear the fees-challenge. But the statutes at issue in those cases (particularly in *Kunkel* and *Hettinger*) were for the sole benefit of private civil defendants in such cases, not for the benefit of the state or other government entity. And as the names of those cases denote, just as the name of *Pennzoil v. Texaco* denotes, it was not the government but the defendants in the

tort actions who were the parties in interest as well as the parties in name.

Although Zwick said she had the option to accept jurisdiction on the fees challenge, and although at the time I certainly agreed with her interpretation of the law on that, I no longer think she even had the option to hear it, given that it was the county and not Upjohn whose interest was at issue in the fees matter. I think the appropriate analysis would be analogous to that in considering discretionary-joinder motions. And at least unless the county was being joined as a party, a joinder motion would have to have been denied.

### D. Illinois appellate courts have no authority to waive or reduce the file-preparation fee

Although this court says otherwise, there is no Illinois rule that enables an appellate court to waive or reduce the file-preparation fee as this court claims. I, at least, know of none, and that is not for lack of trying. Unable to find one myself, I inquired of the deputy chief clerk at the appellate court clerk's office (Steven Ravid, who this year became that court's clerk) and was told no such procedure exists. As this court notes, Illinois Supreme Court Rule 298 provides for petitions to be presented to the trial court and also strictly limits eligibility for that relief. Another Rule permits the severance of some documents from the remainder of the record to allow their preparation for appeal, but it requires the discretionary approval of the trial judge or agreement of the appellee. I presented such a motion to the trial judge but Upjohn contested it successfully on the grounds that neither of its appellate attorneys had been involved in the case at the trial-court stage and they would need the entire record when drafting their briefs (these were cross-appeals).[6] The wording

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[6] This sounds like a transparent excuse to ratchet up the cost to me of the appeal, but it was not. At virtually the same time,

of the Rule suggests that such a motion could be presented also to the appellate court, but when I told Upjohn's local appellate counsel – Thomas Fegan, a longtime Illinois appellate specialist – that I planned to file one he said the appellate court could not entertain motions under that Rule.

Fegan is the author of a book on Illinois appellate procedure, and I checked his book's discussion of the Rule (I don't recall which Rule it was) to verify that he thought this. The book confirmed it and cited supporting case authority.

**E. An exhaustion-of-state-constitutional-remedies prerequisite would divest federal courts of original jurisdiction to hear any federal due process or equal protection claim against any government in Illinois, or at least would divest it of original jurisdiction to hear any such challenge to an Illinois statute.**

Article I, Section 2, of the Illinois state constitution mirrors the Fourteenth Amendment's due process and equal protection clauses. It was the primary state-constitutional provision I asserted in the motions Judge Zwick declined to hear, and in my Rule 381 petition that the Illinois Supreme Court declined to hear. It reads:

> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

If the existence of that or any other constitutional provision requires federal court abstention in my fees-

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Upjohn's lawyers provided me with copies of transcripts of about 25 hearings at $.20 per page, the same rate they charge their clients, saving me more than $2,000 in court-reporter fees.

challenge lawsuit, then they would do the same in other cases challenging Illinois statutes. *But they don't.*

This court's opinion in *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), begins with: "Two licensed taverns in Chicago appeal from the district court's dismissal of their suit to enjoin an Illinois state statute pursuant to which the plaintiffs would have lost their licenses had they not been granted preliminary relief that continues on appeal. The statute, 235 ILCS 5/9-1 et seq., is challenged both as depriving the plaintiffs of their property without due process of law and as a bill of attainder." It ends with: "So the issue 'is not too much delegation, but delegation to the wrong body: delegation of judicial decision-making, for example, to people who are not judges.' [Citations omitted.] That is what Illinois has done and what the due process clause prohibits."

No fear expressed there of unwarranted determination of federal constitutional questions. Nor in *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7th Cir. 2000).

The federal constitutionality of Illinois statutes are challenged in federal district court just as the federal constitutionality of other states' states are challenged in federal district court even when those states' constitutions have provisions that mirror the federal constitutional provision cited. And they proceed through federal district-court and appellate resolution on their merits.

While I was litigating my fee challenge in federal district court, the U.S. Supreme Court issued its opinion in *Saenz v. Roe*, 526 U.S. 489 (1999), in which it affirmed a ruling by the 9th U.S. Circuit Court of Appeals that struck a California welfare-benefits statute as violative of several clauses of the Fourteenth Amendment, including the equal protection clause. The district court in *Saenz*, like the 9th Circuit, had ruled on the merits of the federal constitutional issues, including the equal protection issue.

The Supreme Court in its opinion in *Saenz* did not mention a state-constitutional-grounds exhaustion requirement, and I don't know whether California's constitution has a provision similar to the Fourteenth Amendment's equal protection clause and to the Illinois constitution's Art. I, sec. 2. But I do know this: that on the date that the Supreme Court decided *Saenz*, a virtually identical lawsuit then on appeal before *this* court was based on an Illinois statute indistinguishable from the one in *Saenz*, and that the appellant was not the plaintiff but the state of Illinois. The district court had found that the statute violated the Fourteenth Amendment -- this notwithstanding the existence of the state constitution's Art. I, sec. 2, and that the plaintiff was complaining about the effect of the statute on *her*. See *Hicks v. Peters*, 98-3696 (7th Cir.).

I quoted from *Saenz* to the district court and in my briefs to this court (in 99-3595 at p. 29, in 99-1750 at pp. 36-37). The law clerk assigned to this appeal must have missed it.

This court writes in its Rule 53 Order that it examined the briefs and record in my appeals and concluded that oral argument was unnecessary. But, with the exceptions only of the issue-preclusion question and the state-court-funding-structure matter, both of which I discussed above, none of the issues on which it based its decision and its sanction was briefed to this court, nor even argued to the district court. I requested oral argument – although I admit I really didn't want it. But at least at oral argument I would have learned that my appeals would be determined in a vacuum, upon cascading unscrutinized presumptions that I had no reason to foresee. I could have – and would have – requested leave to file a supplemental brief addressing them, albeit one that (like the others) no one would have read anyway.

I'm writing that brief now, instead of meeting deadlines on a variety of other matters, only some of them related to my avocation as a frequent filer. But I'm not sure

why. I've already lost my appeals, and this court already has decided to sanction me. It makes no difference what I write here.

Just as it made no difference what I wrote in my formal briefs. I could have written anything. I could have confessed to murder (and did, at p. 19 in 99-3595). I could have recited nursery rhymes (pp. 7-9 in 99-1750). I could have excerpted pages from the phone book (pp. 10-18 in 99-3595). I could have divulged a purloined nuclear secret (p. 37 in 99-1750). It was all the same. As it will be again.

### F. A petition pursuant to Illinois Supreme Court Rule 381 gives Illinois the "first crack" at the issue and therefore satisfies the *Pullman*-doctrine prerequisite.

Much of this court's Rule 53 Order reads to me like a shell game. It skewers me for bringing the fees-challenge to federal court instead of presenting it to the Illinois courts. But it also disparages me for petitioning the Illinois Supreme Court to hear the case pursuant to a Supreme Court Rule explicitly designed to provide quick adjudication of such issues. And it notes gleefully that the Supreme Court promptly denied my petition to consider the issue, yet it orders the district court to abstain from the matter because, it says, I didn't bring the matter to the Illinois courts.

This court cites *Mazanec* to support sanctions against me, but *Mazanec* says, "no useful purpose would be served by abstaining in this case. The main purpose of the *Pullman* doctrine is to avoid, if possible, declaring a state statute unconstitutional, by giving the state courts a chance to interpret it narrowly. [Citations omitted.]" *Mazanec* also says "there are two requirements for abstaining under *Pullman*: some risk that the statute will be found unconstitutional unless narrowed; some reasonable chance that it can be narrowed through interpretation." But apart from this court's

rumination about the former, the latter chance is nonexistent; the statute sets the fee, a ceilingless fee of $.25 per page.

This court says I wasn't challenging the fee as unconstitutional for anyone but me. But (even aside from the portions of my brief quoted above that do exactly that in unequivocal terms) the court's assertion is a logical impossibility.

I had never heard of the Tax Injunction Act. But apparently neither had the State's Attorney's Office nor had the district judge. And *Mazanec*, which this court cites in support of sanctions, ends with this:

> At the risk of supererogation, we add a final reason against abstention: the state did not ask for it until the end of the trial. We mentioned this point earlier in connection with delay; but it is also an independent argument against abstention. It is true that abstention can be ordered even if neither party requests it at any stage of the proceedings, [citations omitted] – and this may seem surprising: if the state does not want the protection that the doctrine affords it, why should the federal court extend the doctrine affords it, why would the federal court extend that protection to the state anyway? The answer is that "the state" is not an individual, but a collectivity. State attorneys general (who usually are elected officials, rather than appointees (who usually are elected officials, rather than appointees of the governor) may not have the same interests as other organs of state government; nor may local officials; and federal court should not get involved unnecessarily in what may be intramural struggles of state government even if invited to do so by one of the contenders. But if the responsible state officials are willing to litigate the case in federal court, that court does not have to force it back into state court. [Citations omitted.] These state officials were willing.

My Rule 381 petition – this court's derision of it notwithstanding – accommodated the need for state comity and satisfied the requirement of the Tax Injunction Act.

And when contending parties invoke the process of the federal courts, it becomes the unsought responsibility of those courts to resolve the federal and constitutional issues the judicial system has been forced to confront. See *Bush v. Gore*, 121 S. Ct. 525 (2000). This court shirked its responsibility to consider my fees challenge, and veils that truth under a pious sanction order.

**Conclusion**

Much of this court's Rule to Show Cause relies upon the factually erroneous statement in the state-court appellate opinion that the trial court had issued several sanctions orders were issued against me. On September 18, I filed with the Illinois Supreme Court an Appeal as of Right and, alternatively, a Petition for Leave to Appeal, in which I address that issue at various points in her Petition to the Illinois Supreme Court, but particularly in several paragraphs on p. 16, one of which reads:

> Illinois Supreme Court Rule 219 is titled "Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences." Sec. (c) requires that "[w]here a sanction is imposed … the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." No such sanctions order was entered in this litigation.

I attach to this Response as Exhibit 1 a copy of that 20-page Petition. The Petition addresses all of the matters this court raises about the manner in which I litigated the state-court products liability lawsuit.

I also note an opinion that this court issued earlier this week in *Downey v. State Farm Fire & Casualty Co.*, No. 00-3473 (7th Cir. Sept. 17, 2001), in which the court said it believed initially that no federal jurisdiction existed (the ultimate basis for this court's Rule to Show Cause issued against me) but provided the plaintiff with two opportunities to address the jurisdictional question, first at oral argument and then in a supplemental brief. This court concluded then that federal jurisdiction did exist in that case.

I received in the mail today, September 19, in an envelope postmarked September 18, a copy of the Defendants' Estimate of Total Expenses, which they say amounts to $5,180.00, a very steep sanction, particularly given the absence of any earlier indication that there even existed a jurisdictional issue. In this light, I ask that this court accord me a hearing of the sort provided under F.R.A.P. 46(c) so that I can try to convince it *that* I believed, and *why* I believed, throughout this litigation that federal jurisdiction existed in my fee-challenge lawsuit.

Respectfully submitted,

Beverly B. Mann
Respondent *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

September 19, 2001